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Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

HERCULES INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari to The United States Court Of Appeals for The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Having invoked the authority of the Defense Production Act, 50 U.S.C. app. §§ 2061, *et seq.*, during the Vietnam War to appropriate the entire production capacity of Hercules Incorporated's ("Hercules") Jacksonville, Arkansas, manufacturing facility to produce the government-invented defoliant Agent Orange, may the United States now require Hercules to bear by itself the cost of cleaning up the manufacturing facility, and thereby shift that cost of the Vietnam War to Hercules?

2. May the United States avoid all responsibility for cleaning up the substances that were generated by the Agent Orange production that the United States compelled Hercules to undertake, even though the United States had the authority to require Hercules to alter its means of disposing of the substances and by contract required Hercules to take some measures to control the release of the substances, but now retroactively contends that the measures employed by Hercules to prevent releases were inadequate?

3. During the Vietnam War the United States used rated orders and a directive pursuant to the Defense Production Act, 50 U.S.C. app. §§ 2061, *et seq.*, to compel Hercules to produce the government-designed defoliant Agent Orange for the United States from raw materials acquired through the exercise of government authority under the Defense Production Act. Based upon those actions, and others, is the United States liable, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA"), as a person who "arranged" for the disposal of the "hazardous substances" that the Agent Orange production process generated at Hercules' manufacturing facility?

4. The United States used rated orders and a directive pursuant to the Defense Production Act during the Vietnam War: (a) to compel Hercules to devote its entire manufacturing

capacity to produce the government-designed defoliant Agent Orange for the United States; (b) to enable Hercules to obtain otherwise-unavailable raw materials that Hercules could use only to produce Agent Orange; (c) to prohibit Hercules from meeting its obligations to commercial customers; (d) to impose upon Hercules otherwise-inapplicable health and safety standards that included standards for worker exposure to materials generated in the manufacturing process; (e) to direct Hercules not to obtain product registration and not to use labels and warnings that otherwise would have been required under federal law for a product such as Agent Orange; and (f) to place inspectors on-site to ensure compliance with worker health and safety, quality control, testing, labelling, and shipping requirements imposed upon Hercules by the United States. Based upon those actions, and others, is the United States liable pursuant to CERCLA as an "operator" of the manufacturing facility at the time of the disposal of the "hazardous substances" generated in Agent Orange production?

5. Section 707 of the Defense Production Act, 50 U.S.C. app. § 2157, provides that no person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with an order issued pursuant to the Act. Under that provision, is Hercules immune from liability for environmental clean-up costs resulting directly or indirectly from Hercules' compliance with the rated orders and directive issued pursuant to the Act that required Hercules to produce Agent Orange for the United States?

6. Is Hercules entitled to indemnity from the United States for liability for environmental clean-up costs incurred by Hercules resulting directly or indirectly from Hercules' compliance with the rated orders and directive issued pursuant to the Defense Production Act that required Hercules to produce Agent Orange for the United States?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were as follows:

(1) Appellant Hercules Incorporated (a wholly owned subsidiary, Copenhagen Pectin A/S, a Danish corporation, in turn owns a 40 per cent share of Genu Products Philippines, Inc., a Philippines corporation; the other 60 per cent of Genu Products is owned by individuals, but the shares are not traded on any market);

(2) Appellee The United States of America;

(3) Appellant Arkansas Department of Pollution Control and Ecology;

(4) Appellant Vertac Chemical Corporation (no parent and no publicly traded subsidiaries or affiliates);

(5) Appellant Uniroyal Chemical, Ltd. (Parent: Uniroyal Chemical Company, Inc.).

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No. 94-

HERCULES INCORPORATED

Petitioner,

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari to The United States Court Of Appeals for The Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Hercules Incorporated ("Hercules"), hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this action on January 31, 1995.

PREVIOUS OPINIONS

A reprinted copy of the opinion of the United States Court of Appeals for the Eighth Circuit, entered January 31, 1995, reported as *United States of America v. Vertac Chemical Corporation*, ___ F.3d ___ (8th Cir. 1995), is attached hereto as Appendix A.

A reprinted copy of the Order entered October 7, 1993, in *United States v. Vertac Chemical Corporation*, Civil Action Nos. LR-C-80-109, LR-C-80-110, in the United States District Court for the Eastern District of Arkansas, Western Division, is attached hereto as Appendix B.

A reprinted copy of the Memorandum Opinion and Order of the District Court entered October 12, 1993, reported as *United States v. Vertac Chemical Corp.*, 841 F. Supp. 884 (E.D. Ark. 1993), is attached hereto as Appendix C.

A reprinted copy of the Judgment of the District Court, entered March 3, 1994, is attached hereto as Appendix D.

GROUNDS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to review by writ of certiorari the judgment of the United States Court of Appeals for the Eighth Circuit dated January 31, 1995, which is the subject of this Petition.

STATUTES

1. CERCLA Section 107(a), 42 U.S.C. § 9607(a):

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> . . .
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances . . . shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government

> or a State . . . not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

2. CERCLA Section 101(21), 42 U.S.C. § 9601(21):

> The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

3. CERCLA Section 120(a)(1), 42 U.S.C. § 9620(a)(1):

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

4. CERCLA Section 101(20)(A), 42 U.S.C. § 9601(20)(A):

> The term "owner or operator" means . . . (ii) in the case of an onshore facility or an off-shore facility, any person owning or operating such facility . . . .

5. CERCLA Section 101(29), 42 U.S.C. § 9601(29):

   The term[ ] "disposal" . . . shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903].

6. Solid Waste Disposal Act, Section 1004(3), 42 U.S.C. § 6903(3):

   The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

7. Defense Production Act, Section 101(a), 50 U.S.C. app. § 2071(a):

   The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

8. Defense Production Act, Section 707, 50 U.S.C. app. § 2157:

   No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indi-

> rectly from compliance with a rule, regulation or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

STATEMENT OF THE CASE

This case involves the convergence of two powers of government: the power of government to force its citizens to assist their country in time of war and the power of government to force its citizens to clean up the environment. At issue is the degree of responsibility that the United States must bear when a citizen's compliance with the government's wartime orders results in environmental conditions that the government later orders to be cleaned up.

Conflicting demands that the government placed upon Hercules by orders separated in time by nearly two decades form the basis for this Petition. Underlying the case are unsettled legal questions concerning the scope of liability under CERCLA and the scope of protection that the United States extends to its contractors when the United States compels them to produce strategically important goods during time of war under the authority of the Defense Production Act. Through this Petition, Hercules asks this Court to remove the inconsistency of interpretation and application of these laws that have developed in the District Courts and the Courts of Appeals, and to afford Hercules relief from the punishment that the rulings below, if allowed to stand, will inflict upon Hercules for complying with the government's wartime orders.

The courts below in this case have absolved the United States from any responsibility for its role in creating the conditions at the Vertac Superfund site in Jacksonville, Arkansas, that the government now contends needs to be cleaned up under CERCLA. Those courts have shifted to Hercules costs of the

Vietnam War that properly should be borne by the United States, by finding that Hercules should pay the entire cost of cleaning the site of materials that were generated by Agent Orange manufacturing operations that the government compelled Hercules to conduct, as well as the entire cost of cleaning up materials for which others are responsible — and by finding that the government should have no responsibility whatsoever.

In the 1960s, decision-makers at the highest levels of the United States government made the determination that prosecuting the Vietnam War was critical to the interests of this nation, and that the defoliant Agent Orange, which had been developed by the United States military, was critical to the success of the United States in that war. (JA,[1] Tab 19, ¶¶ 56-81). Based upon those determinations, the United States ordered Hercules to devote its entire herbicide-manufacturing capacity to the production of Agent Orange — a product that was unlike any Hercules ever made for a private customer — knowing that the production would generate a contaminant known as dioxin. Hercules could not legally refuse the orders, and complied with them.

More than a decade later, Congress made the determination, embodied in CERCLA, that the national interest requires many sites where disposal of hazardous substances[2] historically occurred to be cleaned up. A key element of that statutory program required parties who had engaged in activities that resulted in a clean-up requirement to pay clean-up costs, even though the activities when conducted were lawful, were scientifically responsible, and fully complied with the accepted practices of the time.

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[1] "JA" refers to the Joint Appendix filed in the proceedings before the United States Court of Appeals for the Eighth Circuit.

[2] "Hazardous substances" meant nothing to Hercules or anyone else until 1980, when CERCLA first defined such substances and keyed liability to their release or disposal. This Petition refers to hazardous substances as CERCLA now defines them.

The United States decided that the manufacturing plant Hercules had used in the 1960s to produce Agent Orange, but leased in 1971 and sold in 1976, needed to be cleaned up. The government seeks to hold Hercules liable for the clean-up of hazardous substances that were generated by Hercules' government-compelled manufacture of Agent Orange at the plant.

There is no suggestion that Hercules' activities were unlawful or irresponsible. Indeed, the record shows that Hercules took steps to prevent the leaks, spills, and other releases that are inevitable in manufacturing operations and promptly cleaned up any that occurred. CERCLA does not afford a defense to liability to either private parties or the government for such diligence, however.

The court below incorrectly construed CERCLA's liability provisions and incorrectly restricted the protections afforded contractors under the Defense Production Act. As a result, the court approved the United States' improper attempt to shift to Hercules one of the costs of prosecuting the Vietnam War which properly should be borne by the United States.

Ironically, if Hercules still owned the Jacksonville facility and used it to manufacture goods to deliver to the United States under government contract, the government likely would allow the costs to clean up the historical conditions at the site to be passed on to the government under present-day Department of Defense ("DOD") policies.[3] The inconsistent policy that the government advocates in this case would therefore have the

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[3] *See* Defense Contract Audit Agency, *Guidance Paper on Environmental Costs* (October 14, 1992) (Appendix E): "Environmental costs are normal costs of doing business and are generally allowable costs if reasonable and allocable. . . Environmental costs include . . . costs to clean up prior contamination . . . including legal costs." The General Accounting Office estimated in June, 1992, that DOD had reimbursed contractors a total of about $59 million in environmental costs. General Accounting Office, *DOD Environmental Cleanup*, GAO/NSIAD-92-253FS (June 26, 1992) (Appendix F).

effect of penalizing Hercules merely for no longer using this site for DOD contract activities.

Hercules respectfully urges this Court to issue a writ of certiorari and reverse the Eighth Circuit's decision.

Hercules' compelled production of Agent Orange

During wartime, the United States possesses extraordinary authority to compel private manufacturers to produce goods that the government considers to be essential for the war effort. Manufacturers receiving such orders must comply, even if it means that they cannot meet their contractual obligations to their customers and must abandon the commercial market because of their obligation to comply with the government's demands. If companies fail to comply, the government may impose civil and criminal sanctions and effectively take over the production facilities through the use of mandatory injunctions. Defense Production Act, 50 U.S.C. app. §§ 2061, *et seq.*

The government's demands for Agent Orange for the Vietnam War doomed to failure Hercules' attempt to develop a commercial herbicide business. Indeed, the United States rejected Hercules' request for relief from the government's Agent Orange orders so that Hercules could meet the needs of its commercial customers. Instead, after Hercules initially sought some Agent Orange business, the government increased its demand to the point that it required Hercules to devote its entire manufacturing capacity to Agent Orange. Thus, when the United States in December, 1968, abruptly canceled its Agent Orange orders that it had forced Hercules to accept, Hercules' commercial business had been irreparably damaged, causing Hercules to shut down the plant and abandon the herbicide business shortly thereafter.

The government's decision to use defoliants in Vietnam marked the culmination of DOD research and experimentation that began during World War II, when the United States military

had sought to develop aerial spraying of herbicides as a strategic weapon. By removing the canopy of foliage from forests or jungles, enemy positions could more easily be detected and destroyed. The enemy's food crops could also be destroyed. (JA, Tab 19, ¶¶ 15-23).

After experimenting with a large number of herbicide "agents," DOD settled on Agent Orange as its defoliating agent of choice for use in Vietnam. That agent consisted of equal parts of the undiluted n-butyl esters of 2,4-D [4] and 2,4,5-T ,[5] which DOD had concluded by 1951 were the most effective agents for crop destruction. (JA, Tab 19, ¶¶ 24, 73-74). DOD also knew, from its years of study and experimentation, of the toxic effects of an impurity of Agent Orange, TCDD or dioxin,[6] that DOD had identified by 1957. (JA, Tab 19, ¶¶ 38-54).

Thus, when the United States ordered Hercules to produce Agent Orange, it knew that the Agent Orange manufacturing process necessarily would result in the generation and release of what are now classified as hazardous substances, including dioxin. (JA, Tab 19, ¶¶ 38-54, 139). By invoking its authority under the Defense Production Act to require Hercules to produce vast quantities of Agent Orange, the United States subjected Hercules to the risks, whether then known or not, that would result from that production. One of those risks — which neither the United States nor Hercules could have foreseen at the time — was that the United States would someday require then-undetectable concentrations of dioxin in soil, on buildings, and in

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[4] 2,4-D is 2,4-dichlorophenoxyacetic acid, a weed killer.

[5] 2,4,5-T is 2,4,5-trichlorophenoxyacetic acid, a brush killer.

[6] TCDD, or 2,3,7,8-tetrachlorodibenzo-para-dioxin, today is considered to be the most toxic isomer of a family of chemicals known generally as dioxins. "Dioxin," as used in this Petition, refers to TCDD. TCDD is produced in minute amounts when 2,4,5-T is produced. In contrast to the wealth of knowledge accumulated by the United States, Hercules first learned of the impurity dioxin in February, 1965.

process equipment to be cleaned up.[7] With the passage of CERCLA and its enforcement by the United States that risk became a reality.

Around the same time that the United States decided to use herbicides for military purposes in Vietnam, Hercules coincidentally entered the commercial herbicide business as a complement to its agricultural chemicals business. In late 1961, Hercules bought Reasor-Hill Corporation's Jacksonville plant (which comprised a small part of the Arkansas Ordnance Plant that DOD had used for the manufacture of munitions from the 1930s through World War II) and associated equipment. Little more than two years later, however, DOD's demand for Agent Orange to defoliate the jungles of Vietnam swiftly eliminated the possibility that Hercules' planned commercial herbicide business could succeed.

In June, 1964, the United States issued the first of what would be 14 orders over a period of less than four years for a total of 2,755,047 gallons of Agent Orange.[8] (JA, Tab 19, ¶ 95). These were no ordinary orders, however. The United States ordered a product that Hercules had never before made, and never made thereafter for any customer other than the United States. The product was designed by the United States and made to the specifications demanded by the United States. (JA, Tab 19, ¶¶ 98, 123).

The United States' orders to Hercules also differed from ordinary contracts in that Hercules could not refuse them. The United States issued *all* of its orders for Agent Orange from 1964-1968 as DO-rated orders under the Defense Production Act. *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740,

[7] Not only could passage of such a retroactive law not be foreseen, but the concentrations of dioxin in dust and soil at the plant could not even have been detected using test methods that were available in the 1960s.

[8] The United States paid Hercules a total of about $15 million for all of the Agent Orange Hercules produced. Present estimates of clean-up costs total more than ten times that amount.

844 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). Hercules would have been subject to civil and criminal penalties, as well as mandatory injunctions, if it had not complied with DOD's demands. (JA, Tab 19, ¶ 83).

Unlike the rest of Hercules' herbicide products, which consisted of formulations having only a few percent active ingredient, such as 2,4-D or 2,4,5-T, in a mixture of inert ingredients, Agent Orange was full strength herbicide designed by the military to be sprayed from aircraft over vast areas of jungle. (JA, Tab 19, ¶ 123). It had no commercial market. (JA, Tab 19, ¶ 123). It was far too potent for agricultural use. Moreover, it was designed to drift widely to maximize coverage. That trait aided the military goal of defoliating large tracts of jungle and cropland, but would have caused disastrous consequences for farmers and Hercules' other commercial customers, who depended upon the ability to apply herbicide products to their own property without killing or damaging their neighbors' crops or other foliage.

In addition to supplying exact specifications for the composition of Agent Orange, the United States supplied many other specifications and military standards touching upon nearly every aspect of production. (JA, Tab 19, ¶¶ 24, 31-34, 36, 98, 99). The United States left virtually no detail of the transactions to Hercules' discretion. Controls that the United States imposed upon Hercules included:

- The United States specified the composition of Agent Orange, which DOD had developed.
- The United States specified the tests and test methods that it required Hercules to use to prove to the United States that Hercules' Agent Orange had the composition and quality specified by the United States. (JA, Tab 19, ¶¶ 98-99).
- The United States dictated the price that it would pay for Agent Orange, and retained the right to renegotiate the

contracts if it believed Hercules was making "excess profits." (JA 02168, exh. 53, ¶ 11, incorporating Renegotiation Act of 1951, 50 U.S.C. app § 1211).

- The United States required Hercules to use the priority rating system in Hercules' orders to all of its raw materials suppliers. (JA, Tab 19, ¶ 86; JA 02132-33; JA 03303).
- The United States waived import duties on materials that Hercules had to import to meet its Agent Orange production requirements because of domestic shortages. (JA, Tab 19, ¶ 112).
- The United States promulgated precise requirements for the packaging, labelling, storing, and shipping of the finished Agent Orange, including the size and location of the orange stripe on the drums that identified the contents as Agent Orange and the precise manner in which drums of Agent Orange could be placed into rail cars for shipment. (JA, Tab 19, ¶ 128).
- The United States sent inspectors to the plant on a near-daily basis to ensure compliance with the government's requirements. If an inspector found that Hercules had not complied with its obligations in any way, the United States directed Hercules to correct the non-compliance. (JA, Tab 19, ¶¶ 91-93).
- The United States prohibited Hercules from seeking or obtaining registration of Agent Orange under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.* ("FIFRA"), which would have been required if Hercules had produced Agent Orange as a commercial product. The United States ordered Hercules not to put warnings or use instructions on Agent Orange containers which would have been required under FIFRA. (JA, Tab 19, ¶ 130).

- The government's consistently increasing demands for Agent Orange culminated on March 24, 1967, when the United States issued a directive to Hercules which required Hercules to divert its *entire* production capacity of 2,4,5-T to Agent Orange. (JA, Tab 19, ¶¶ 76-80, 102).
- The directive required Hercules to provide the government with detailed monthly reports regarding production, total shipments, shipments against rated orders, and end-of-the-month inventory accounting of 2,4,5-T and 2,4-D. (JA, Tab 19, ¶¶ 102-103).
- Because of Hercules' equipment configuration, the requirement for Hercules to devote its entire 2,4,5-T manufacturing capacity to Agent Orange likewise diverted all 2,4-D production capacity to Agent Orange, thereby precluding all commercial sales. (JA, Tab 19, ¶¶ 82-88, 102-105).
- When Hercules could still not produce enough Agent Orange to satisfy the demand of the United States, the United States required Hercules to expand its plant capacity, and issued a rated order with priority ratings to help Hercules acquire new equipment. (JA, Tab 19, ¶¶ 100-101, 115). This rated order violated the government's own regulations that rated orders could not be used for capital equipment. Hercules' increased production capacity was devoted to Agent Orange production.
- A shortage of TCB,[9] the essential raw material required for the manufacture of 2,4,5-T, impaired Hercules' ability to meet government demands for Agent Orange. The United States issued directives directly to TCB manufacturers to supply Hercules with sufficient TCB to produce Agent Orange in the quantities that the United States required. (JA, Tab 19, ¶ 113).

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[9] TCB is the shorthand notation for 1,2,4,5-tetrachlorobenzene. Hercules did not manufacture TCB.

- Hercules could not use TCB and other raw materials acquired through the use of directives, rated orders, or duty waivers for any purpose other than the manufacture of Agent Orange for the government without subjecting itself to criminal or civil penalties. (JA, Tab 19, ¶¶ 83, 112).
- Because of the United States' demands, Hercules could not satisfy its contractual requirements to existing customers, much less develop new ones. The United States rejected Hercules' request for some relief from the government's rated orders so that it could satisfy its pre-existing commercial commitments. (JA, Tab 19, ¶¶ 104-105).
- The United States' use of rated orders subjected Hercules involuntarily to the health and safety requirements of the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35, *et seq.* ("Walsh-Healey Act"). Hercules otherwise would not have been subjected to such standards, since general occupational health and safety regulations had not yet been imposed upon industry at the time. The health and safety requirements placed in the contracts covered plant conditions which might affect safety, including releases and spills of materials, clean-up of materials to which workers could be exposed, and "housekeeping" practices, which included disposal activities. (JA, Tab 19, ¶¶ 151-156).
- During two inspections conducted pursuant to the Walsh-Healey Act, the United States' inspectors undoubtedly observed Hercules' disposal practices, and the government now admits that it knew or should have known about Hercules' disposal activities. (JA, Tab 19, ¶¶ 126, 139, 157, 160). Presumably, the inspectors could have ordered Hercules to take corrective action.

The March 1967 directive, the rated order contracts, the near-constant presence of government inspectors at the plant, and contract provisions inserted pursuant to the Walsh-Healey Act gave the United States virtually unlimited control over

Hercules' production. Indeed, the military commandeered not only all of Hercules' manufacturing capacity at the Jacksonville plant, but the entire domestic capacity for producing 2,4,5-T, as well. Apart from World War II, this may be the only instance in United States history in which an important commercial product has been completely removed from the market to meet military requirements. (JA, Tab 19, ¶ 81).

The United States' environmental enforcement activity

Nearly a decade after Hercules first leased the plant to Vertac Chemical Corporation ("Vertac") the United States, through the Environmental Protection Agency ("EPA"), sued Vertac and Hercules. The United States contended that Hercules had contaminated the site through the activities that the United States, through DOD, had ordered Hercules to carry out. Unlike Hercules, which kept the plant in good repair to prevent releases from the process areas into the environment, Vertac had allowed the plant to deteriorate. It is now known that leaks and spills of materials became widespread during Vertac's operation of the plant. A Consent Decree was entered in this case in January, 1982, requiring Vertac alone to clean up the site.

Vertac abandoned the site in February, 1987, leaving behind its Consent Decree obligations, more than 3,000 drums of waste generated in the 2,4,5-T manufacturing process ("T-waste"), and more than 25,000 drums of waste from the 2,4-D process ("D-waste"). In addition to the drums, Vertac left behind — *i.e.*, "disposed of" — a staggering array of hazardous substances in the process equipment, tanks, piping, and other vessels. The deterioration of these structures create the threat that the hazardous substances will be released into the environment. The abandoned and decaying buildings add a physical danger.

With Vertac in receivership and its assets depleted, the United States now seeks to force Hercules to pay for the entire

cost of cleaning up the Vertac site, even though most of the problems at the site are attributable to Vertac's operations and pose a hazard today only because Vertac abandoned the site and the 1982 Consent Decree. At the same time, the United States ignores the reality that the United States itself directed Hercules' activities which form the basis for the liability EPA alleges. Moreover, despite the unrefuted evidence in the record that the environmental harm at the Vertac site is divisible, the United States EPA has taken the position that the harm is not divisible, and that Hercules is jointly and severally liable for all costs of clean-up at the Vertac site. Upon motion by the United States, the trial court entered summary judgment against Hercules on that issue, but the order is not yet appealable.

Thus, as the case stands now, Hercules finds itself in the position of having been held entirely liable for the clean-up of the Vertac site, largely because it obeyed the wartime orders of the United States.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613.

REASONS FOR GRANTING THE WRIT

Inconsistent, unpredictable judicial interpretations of CERCLA's liability provisions have turned environmental litigation and administrative enforcement proceedings into a high stakes gamble, as this case illustrates. Because of the uncertainty, parties against whom CERCLA claims are made cannot accurately predict whether they are subject to liability for clean-up costs, or whether others are liable for a share of the costs.

The lack of uniformity places these parties on the horns of a dilemma. On one hand, the inconsistent interpretations of CERCLA liability provisions, together with the massive poten-

tial liability that may result from a finding of CERCLA liability, encourages parties to litigate their liability and that of others. On the other hand, CERCLA inflicts extraordinary penalties upon parties who decline to fund or undertake a clean-up, and are thereafter found to be liable.[10] Those consequences may cause parties who are uncertain of their liability because of inconsistent judicial interpretations to comply with government demands to undertake or fund clean-ups, even though they have a good faith basis for believing they are not liable. When the government is also potentially liable, as it is in this case, uniform and predictable applications of CERCLA principles are especially important to dispel the perception that CERCLA's liability rules are applied more leniently to the government than they are to private parties.

The Eighth Circuit compounds the problem resulting from the inconsistent judicial interpretations of CERCLA's liability provisions by its restrictive reading of the immunity provision of the Defense Production Act — which on its face is not restricted in any way. If allowed to stand, the court's ruling would put defense contractors which were compelled to produce strategically important goods for the United States military at

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[10] A person who, without sufficient cause, willfully violates, or fails or refuses to comply with, an order issued under CERCLA § 106(a), 42 U.S.C. § 9606(a), is subject to fines of up to $25,000 for each day of violation or failure to comply. CERCLA § 106(b)(1), 42 U.S.C. § 9706(b)(1). The non-complying person is also subject to liability for the costs of clean-up as well as punitive damages of up to three times the costs that are incurred by Superfund. CERCLA §§ 107(a), 107(c)(3), 42 U.S.C. §§ 9607(a), 9607(c)(3). Since federal courts have no jurisdiction to review the remedy that EPA selects or the propriety of orders issued under Section 106 (a) until EPA chooses to bring an action to recover costs under Section 107 or to enforce an order under Section 106 (a), or until the responsible party complies with the order and seeks to make a claim against the Superfund under Section 106 (b), the pressure upon a party to comply with an EPA order is intense. CERCLA § 113(h), 42 U.S.C. § 9613(h).

risk of incurring millions of dollars in CERCLA liability resulting from their compliance with government orders.[11]

Unlike contractors today, who build environmental costs into their contract prices with the government,[12] during the Vietnam War contractors could not have foreseen that a statute passed more than a decade later would retroactively impose hundreds of millions of dollars in liability upon them because they obeyed government orders. The Eighth Circuit has shifted those costs of waging war from the government to the contractors.

This Court has not construed the "operator" and "arranger" liability provisions of CERCLA that are at issue in this case. Likewise, this Court has not determined the level of protection that the Defense Production Act affords contractors which are required to comply with the government's rated orders. This case reflects the inconsistency and conflict in lower courts' rulings in these areas. Indeed, the result ordered by the Eighth Circuit is directly contrary to the result in a case that the government itself represented to the Third Circuit "involve[s] the same or similar issues to those presented in [the *FMC*] appeal." *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 846 (3d Cir. 1994) (*en banc*). Both the government and industry need the Court's direction on these matters.

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[11] In this case alone, EPA estimates that cleanup costs may exceed $150 million.

[12] *See supra* note 3 and accompanying text.

ARGUMENT

CERCLA liability

Rarely, if ever, has a single statute had the sweeping effect on American industry, business, banking, and real estate that CERCLA has had. Overnight, CERCLA created billions of dollars in potential liability for conditions that had resulted from practices that at the time were legal and scientifically reasonable.

The magnitude of CERCLA liability is matched only by the uncertainty of application of its liability provisions. The statute provides no guidance on standards to be applied to "operator" and "arranger" liability. CERCLA defines an "operator" of a facility as a person who "operates" the facility. The statute does not attempt even such a circular definition of an "arranger" for disposal of hazardous substances. It merely provides that a person who "by contract, agreement, or otherwise" arranges for disposal of hazardous substances at a facility is liable as an "arranger." Perhaps unsurprisingly, no uniform or predictable standards have emerged in the case law for "operator" or "arranger" liability determinations under CERCLA. The opinion of the Court of Appeals in this case emphasizes the conflicts in the cases which address these issues.

As it pertains to CERCLA liability (*i.e.*, setting aside Defense Production Act immunity and indemnity), this case turns upon whether a "person" who contractually imposes some control over the disposition of hazardous substances, and who has the statutory and contractual authority to do more, can avoid clean-up liability by doing nothing while disposal occurs. In previous cases, the Eighth Circuit itself ruled that "[i]t is the *authority* to control the handli..g and disposal of hazardous substances that is critical under the [CERCLA] statutory scheme." *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) ("*NEPACCO*") (emphasis sup-

plied). Those who had the authority to control, even absent contract provisions like those in the Agent Orange contracts, would not be allowed in the Eighth Circuit "to simply 'close their eyes' to the method of disposal" of hazardous substances. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1382 (8th Cir. 1989). Instead, such persons would be held liable for the clean-up that the disposal made necessary.

Thus, corporate officers who had the authority to control the corporation's hazardous substances disposal, but did not act, could be held liable. *NEPACCO*, *supra*. So, too, could a company which supplied the raw material to a formulator for conversion into a finished product to be returned to the supplier, knowing that waste would inherently be generated in the process. The Eighth Circuit in 1989 found that the ownership by the customer of the raw material, work in process, and finished product evidenced the critical authority to control the disposal of hazardous substances, even though no contract provision addressed the disposal issue. *Aceto*, *supra*. In short, a party who "retain[s] the authority to control the handling and disposition of a hazardous substance and, by failing to act, in effect, decide[s] upon the disposition by negative personal involvement" is liable under CERCLA. *United States v. Arrowhead Refining Co.*, 829 F. Supp. 1078, 1091 (D. Minn. 1992), *citing NEPACCO*, 810 F.2d at 743. Now, in its decision below, the Eighth Circuit has allowed the government itself to "close its eyes" and avoid liability.

Further, the Eighth Circuit, in an opinion issued barely a month before its decision in this case, acknowledged that its rule as to operator liability directly conflicts with the rule in other circuits concerning the extent, if any, to which authority must be exercised by a party in order for that party to be liable as an operator. *See United States v. Gurley*, 43 F.3d 1188, 1192-93 (8th Cir. 1994). The Eighth Circuit summarized the conflict in court decisions as follows:

Federal courts have struggled with these two concepts when addressing the question of whether an individual may be found liable as an "operator" under § 9607(a)(2). In some circuits, a plaintiff must prove that an individual defendant had *actual* responsibility for, involvement in, or control over the disposal of hazardous waste at a facility. *See Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (holding that plaintiff must allege that individual defendant "*directly* and *personally* engaged in conduct that led to specific environmental damage at issue"); *Riverside Market Devel. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.) (holding that proper focus is "the extent of [individual] defendant's personal participation in the alleged wrongful conduct"), *cert. denied*, 112 S. Ct. 636 (1991); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (1st Cir. 1985) (holding that individual defendant was "operator" because he was "in charge of the operation of the facility"); *see also Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1457 (N.D. Cal. 1991) ("an individual cannot be liable as an 'operator' under CERCLA Section 107(a)(2) [42 U.S.C. § 9607(a)(2)] unless that individual actually participates in the operation of the facility at which hazardous substances are disposed of, exercised control over the company immediately responsible for the operation of that facility, or is otherwise intimately involved in that company's operations").

On the other hand, in one circuit, a plaintiff can succeed by proving less than that; an individual defendant "'need not have exercised actual control in order to qualify as [an] operators under § 9607(a)(2), so long as the *authority* to control the facility was

> present.'" *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-37 (4th Cir. 1992) (emphasis added) (quoting *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied* 113 S. Ct. 377 (1992)); *see also Northwestern Mut. Life Ins. Co. v. Atlantic Research Corp.*, 847 F. Supp. 389, 397 (E.D. Va. 1994) (holding that individual defendant may be liable if he has "the 'authority to control' activities on the facility"); *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144, 152-53 (D. Me. 1992) (holding that liability is proper if individual defendant had authority such that he "could have prevented the hazardous waste discharge"); *cf. Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1543-44 (W.D. Mich. 1989) (stating that court should "weigh the factors of the corporate individual's degree of authority" but also should consider "evidence of responsibility undertaken and neglected").

Gurley, 43 F.3d at 1192-93 (emphasis in original).

The Eighth Circuit in *Gurley* sided with the courts which have decided that authority to control the disposal of hazardous substances is not sufficient for operator liability. As the court acknowledged, however, other courts have decided to the contrary.[13] When cost recovery actions for a single facility may be

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[13] Authority to control has been the determinative factor for CERCLA liability in other contexts, as well. In *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991), a lender which became involved in certain management activities at a facility was held liable for costs. Although the decision turned on the application of the "security interest exemption" to liability as an "owner" under CERCLA, found in 42 U.S.C. § 9601(20)(A), its analysis is remarkably similar to that used in "operator" liability cases. Although the lender did involve itself in decisions regarding disposal practices, the court specifically found that such actual control was not necessary. The court held that evidence that the lender "could affect" disposal decisions if it chose to do so gave rise to liability. 901 F.2d at 1557-58.

brought in more than one circuit, therefore, the choice of forum could govern whether the inaction of a party with the power and authority to control disposal at that facility will result in liability.

On the record of this case, the United States without question would be liable if the standard were authority to control, since the government's authority to control under the Defense Production Act was complete. Even under the standard that the Eighth Circuit has now adopted, however, the record, which was largely stipulated in the District Court, demonstrates that the District Court and the Court of Appeals erred in finding that the government's exercise of control was not sufficient to cause the government to be liable under CERCLA.

The court just as easily could have pointed out a similar conflict as to the degree of control that must be exercised before arranger liability will attach. In *Aceto*, there was no allegation that the defendants actually exercised any control over the formulating activities of the formulator. That, in fact, was the point: the arrangement was such that the defendant could have exercised control, but did not, thereby allowing the site to become contaminated.[14]

Some courts have followed this reasoning, others have not. *See, e.g., Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994) ("Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process."); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1279 (W.D. Mich. 1991) (Constructive possession and authority to control disposition of hazardous substances is sufficient for arranger liability.); *United States v. Bliss*, 667 F. Supp 1298, 1306 (E.D. Mo. 1987) (Broker held liable as an arranger because it had the authority to control the place and

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[14] The "disposal" which gave rise to liability in *Aceto* was primarily routine leaks, spills, and other releases of substances that occurred in the manufacturing process. The same kind of "disposal" forms the principal basis for the United States' claim against Hercules.

manner of disposal; corporate officials were liable because they had ultimate authority for decisions regarding disposal and actively participated in the arrangement for the transportation of hazardous substances.); *United States v. Ward*, 618 F. Supp. 884, 894-95 (E.D. N.C. 1985) (Corporate officer who was personally involved in the decision to dispose of hazardous substances was liable as an arranger even if he did not know where waste would be disposed.); *Louisiana-Pacific Corporation v. ASARCO Incorporated*, 24 F.3d 1565 (9th Cir. 1994) (Seller of by-product is liable as arranger for disposal even though it did not select the facility where the by-product was disposed.); *General Electric Company v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992) (Lessor with economic power over lessee is not liable as an arranger for lessee's disposal of hazardous substances unless it gave itself contractual authority over the disposition of such hazardous substances.). Now the Eighth Circuit has contradicted itself on the point in this case.

CERCLA makes liable a person who "arranged for disposal or treatment" of "hazardous substances owned or possessed" by that person. The Eighth Circuit previously opined that "[r]equiring proof of personal ownership or actual physical possession of hazardous substances . . . would be inconsistent with the broad remedial purposes of CERCLA." *NEPACCO*, 810 F.2d at 743. Yet the court tried to distinguish this case from the "arrangement" in *Aceto* by noting that the government in this case did not own the raw material that it caused to be supplied to Hercules, and did not physically possess that raw material. In *Aceto* the same court found that ownership by the "arrangers" was relevant only insofar as ownership carried with it the *authority* to control the raw material, work in process, and finished product. In this case, however, the United States had far more authority than did the suppliers/customers in *Aceto* to control the raw materials, work in process, and finished product, all of which the United States "possessed." The government exercised its power to require the raw materials suppliers to sell

the scarce raw material to Hercules. Hercules could lawfully use the raw material only for the government. All work in process resulting from the raw material was required to be used in the manufacture of finished product for the government. The United States exercised dominion and control over the raw material, work in process, and finished product, and therefore possessed[15] those materials. The government arranged for the disposal of the hazardous substances that it knew would be generated in the use of those materials that the government required.

Furthermore, although it purported to agree with the Third Circuit's *en banc* decision in *FMC*, and although the United States included this case on a list of cases that the government represented "involve the same or similar issues to those presented in [the *FMC*] appeal," *FMC*, 29 F.3d at 846, the Eighth Circuit emphasized immaterial fact differences between this case and *FMC* in arriving at a contrary result. The court failed to apprehend that the two cases are indistinguishable on the factors that formed the basis for the Third Circuit's ruling that the United States was liable.

The Third Circuit based its holding in *FMC* on the "conclusion that the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." *FMC*, 29 F.3d at 843. As the Third Circuit observed in *FMC*, "every day [Hercules] did what the government ordered it to do." *Id.* at 844.

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[15] Because neither CERCLA nor its legislative history provides guidance as to the meaning of such terms as "operator," "arranger," "owner," or "possessed," some courts have referred to dictionary definitions. *See, e.g., United States v. New Castle County*, 727 F. Supp. 854, 873 n. 41 (D. Del. 1989). Webster's Third New International Dictionary (1986) defines "possess," in part, as "furnish - used with *of* or *with*," "have a right to," and "seize or gain control of." The United States both "furnished" raw material and had a "right to" and "control of" the work in process and finished product made from that raw material.

Here, no less than in *FMC*, the government determined what product that facility would produce (Agent Orange), the level of production (as much as Hercules could produce, to the exclusion of all else, including commercial products), the price of the product (no "excess profits"), and to whom the product would be sold (the government itself). Indeed, absent government demands, Hercules would never have made Agent Orange.

The court below found it to be significant that Hercules bid on the first of the Agent Orange contracts. Nevertheless, any significance that could be attached to that fact disappears in light of the reality that Hercules thereafter had no choice but to produce Agent Orange in amounts that caused it to lose its commercial business. Once a soldier volunteers for duty, he loses all discretion and must obey orders, regardless of the consequences. Likewise, once the government issued even the first rated order, it brought all of the government's power to bear upon Hercules, and Hercules could not refuse to perform, regardless of the consequences.

Furthermore, there is nothing in the *FMC* decisions to suggest that American Viscose resisted having its plant converted to the manufacture of high tenacity rayon,[16] or that it was unwilling to receive the major increase in business that resulted from the government's need for high tenacity rayon. In addition, unlike Agent Orange, which had no commercially useful application, the high tenacity rayon that American Viscose manufactured for use in military aircraft and truck tires would no doubt have been suitable for civilian aircraft and truck tires, as well. From the standpoint of CERCLA liability, the relevant consideration is the degree of control, not whether the control initially was invited.

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[16] The conversion was accomplished simply by changing the gears of the plant's machines and the speed of the spinning wheels. *FMC v. United States Dep't of Commerce*, 786 F. Supp. 471, 474 (E.D. Pa. 1992) (Finding of Fact 29).

In this case, no less than in *FMC*, the government supplied raw materials and equipment for Hercules to use in Agent Orange manufacture for the government. Without the use of government authority, Hercules would not have been able to obtain TCB or other essential raw materials. Hercules could not lawfully have used those raw materials acquired through government power, or the work in process derived from those raw materials, for any manufacturing other than Agent Orange for the government. Without the use of government authority, Hercules could not have accelerated the delivery of equipment that was necessary to meet the government's demands for increased production.

In this case, no less than in *FMC*, the government knew that generation of substances that are now classified as hazardous substances would occur in the production process, and that an increase in production would automatically increase the amount of such substances generated. The government developed the specifications for Agent Orange, was familiar with the properties of its component parts, knew about the substances that would be generated in its production, and knew that some of the component parts and substances generated were toxic.

The government controlled Hercules in ways that were not cited in *FMC*, as detailed in the Statement of the Case. Importantly, the government contractually directed Hercules how to manage toxic materials by subjecting Hercules to health and safety standards that did not apply to industry generally at the time.[17]

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[17] Because the Walsh-Healey Act imposed health and safety standards only on government contractors, the United States exercised contractual, not regulatory, power in imposing those standards. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Accordingly, *United States v. Dart Indus., Inc.*, 847 F.2d 144 (4th Cir. 1988), and *United States v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989), upon which the court below relied, have no applicability to this case.

In this case, no less than in *FMC*, to conclude that the government was not an operator "would create a precedent completely out of harmony with the case law on what makes a person an operator under CERCLA." *FMC*, *supra*, 29 F.3d at 845. The lack of harmony between this case and *FMC*, and between this case and other cases deciding operator and arranger liability, justifies review by this Court.

Furthermore, the effect of the decisions of the courts below amounts to a taking of Hercules' property. The price for Agent Orange that the government required Hercules to accept did not reflect the true cost of the product, since it included nothing for the eventual clean-up of the manufacturing facility. Hercules is therefore being asked to bear a disproportionate share of the costs of a product produced in support of the Vietnam War, and therefore costs that should be borne by the public.[18]

If allowed to stand, the decision below will also lead to an inequitable division of environmental costs. Parties, both government and private, who had authority to control disposal

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[18] Since the Takings Clause of the Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), takings cases are instructive. In such cases, this Court has required property owners to be compensated for intrusions of far less consequence than the intrusion upon Hercules' property of substances that resulted from the government's Agent Orange orders. Regulations that compel a property owner to suffer a physical invasion of his property entitle the property owner to be compensated "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992). "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.*, *citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (television cable attached to building); *United States v. Causby*, 328 U.S. 256 (1946) (intrusion of airspace by low-flying aircraft); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (navigational servitude imposed on private marina).

practices, but instead "closed their eyes" to those practices, will have no responsibility for clean-up.

The United States undeniably had the power to direct Hercules to operate its Agent Orange manufacturing facility in a fashion to protect the environment. It exercised its power over Hercules in virtually every aspect of Hercules' operation. Yet the United States did not attempt to alter Hercules' disposal of substances that the United States now claims must be cleaned up. The District Court and the Court of Appeals have approved of that abdication of responsibility by the United States.

Immunity and implied indemnity under the Defense Production Act

Section 707 of the Defense Production Act, 50 U.S.C. app. § 2157, is unequivocal on its face. It provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

50 U.S.C. § 2157. Hercules contends that this section means what it says. If Hercules is liable under CERCLA, it is for an "act or failure to act resulting directly or indirectly from compliance with" the rated orders and the directive issued by the United States to Hercules under the Defense Production Act. Through Section 707, the United States provides immunity for, and therefore an implied indemnity against, CERCLA liability.

Section 707 is clear and unambiguous. Nothing in the language of the statute suggests that the immunity granted by Section 707 is limited to contract claims by commercial customers of the manufacturer which receives a rated order. Section

707 does not except environmental liability, and nothing in CERCLA retroactively repealed the immunity. Contractors should not be forced to examine the legislative intent of either Section 707 or any statutory obligations that defense contracts impose upon contractors to determine whether they are protected when the statutes themselves are unambiguous.

Without any independent analysis, however, the Eighth Circuit adopted the opinion of the two judges of the Federal Circuit who found that the immunity provision applied only to contract liability which might result from an inability to perform contracts because of the obligations imposed by rated orders. *Hercules Incorporated v. United States*, 24 F.3d 188 (Fed. Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3388 (No. 94-818). Hercules submits that such a conclusion cannot be justified, and that the dissenting judge in *Hercules* was correct when he opined:

> [I]f Congress intended to limit the sweeping scope of the hold harmless provision to contract performance only, Congress could have [done so] . . . It is difficult to imagine more "clear and unequivocal" terms than actually used by Congress: "***No person shall be held liable for damages*** or penalties for any act or failure to act resulting ***directly or indirectly*** from compliance with a rule, regulation, or order issued pursuant to this Act . . ." 50 U.S.C. app. § 2157 (1964). The law as well as the circumstances support the Government's liability.

Id., at 210 (Plager, J., dissenting) (emphasis in original).

Indeed, the legislative history supports this interpretation. The Senate Report of the 1952 amendment to the Act stated that Section 707 "protects a person from liability, *under contract or otherwise*, as the result of compliance with the act or regulations issued under the act." S. Rep. No. 1599, 82d Cong., 2d Sess.

(1952), reprinted in 1952 U.S.C.C.A.N. 1789, 1818-19 (emphasis supplied).[19]

As this case and *Hercules* demonstrate, potential non-contract liability can far exceed any potential contractual liability to disappointed customers. Confining Section 707 to contract claims, as the Federal Circuit and Eighth Circuit would do, would eliminate that section as a source of meaningful protection to contractors who comply with rated orders.

This Court has before it a Petition for a Writ of Certiorari to review the Federal Circuit decision in *Hercules*. Hercules respectfully urges to Court to review the scope of immunity and indemnity protection that the Defense Production Act provides to contractors by reviewing this case, as well.

CONCLUSION

Two major public policy initiatives are at stake in this case. First, it is vital that the country have the means of compelling industry to provide material that the military needs in time of war. At the same time, this nation has an interest in ensuring that contractors who are compelled to produce goods for the military are protected from liability that results from their compliance with the government's orders, so that the costs of waging war are not imposed unfairly on only some of the country's citizens.

Second, it is vital that liability for the staggering costs of cleaning up the environment be imposed predictably, uniformly, and as fairly as the statute permits. Otherwise, the public will lose confidence in the government's ability to achieve the goals that Congress set for it by adopting CERCLA.

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[19] The history of the Defense Production Act in general and Section 707 in particular is described in detail in Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Petitioners in *Hercules*, at 4-10.

This Court can provide direction that is necessary to advance both goals by granting this Petition and issuing a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 94-1946/1956/1960/2006

United States of America*,

Plaintiff-Appellee,

v.

Vertac Chemical Corporation,

Defendant-Appellant.

Hercules, Incorporated;
Uniroyal Chemical, Limited;

Defendants.

Standard Chlorine of Delaware,Inc.,

Third Party-Defendant.

Arkansas Department of Pollution
Control and Ecology,

Plaintiff,

v.

Vertac Chemical Corporation;

Defendant-Appellant.

Hercules, Incorporated,

Defendant.

Appeals from the United States District Court
for the Eastern District of Arkansas

Submitted: November 14, 1994
Filed: January 31, 1995

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*Title per counsel. Because of multiple cross-, counter- and third-party issues, caption is 106 pages long. Full caption is on file with the Clerk's Office of the Eighth Circuit Court of Appeals in St. Louis, MO.

Before McMILLIAN, WOLLMAN and HANSEN, Circuit Judges.

McMILLIAN, Circuit Judge.

Vertac Chemical Corp. (Vertac), the Arkansas Department of Pollution Control and Ecology (ADPCE), Hercules, Inc. (Hercules), and Uniroyal Chemical, Ltd. (Uniroyal) (collectively appellants), appeal from an interlocutory order entered in the United States District Court[1] for the Eastern District of Arkansas denying their motions for summary judgment and granting a cross-motion for summary judgment brought by the United States of America. *United States v. Vertac Chem. Corp.*, 841 F. Supp. 884 (E.D. Ark. 1993) (*Vertac*). For reversal, appellants argue that the district court erred in holding that the undisputed facts establish as a matter of law that the United States cannot be held liable as either an operator or an arranger within the meaning of § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(a). Hercules additionally argues that the district court erred in holding that it is not entitled to immunity under § 707 of the Defense Production Act of 1950 (DPA), 50 U.S.C. app. § 2157, or implied indemnity from the United States. For the reasons discussed below, we affirm the order of the district court.

Background

This case began as a cost recovery action brought by the United States under CERCLA against numerous potentially responsible persons associated with a former herbicide manufacturing facility located in Jacksonville, Arkansas (the Jacksonville facility). The present appeal arises from motions for summary judgment filed by Vertac, ADPCE, and Hercules, and

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1 The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

a cross-motion for summary judgment filed by the United States. By memorandum opinion and order dated October 12, 1993, the district court granted the United States' motion and denied the motions brought by Vertac, ADPCE, and Hercules. *Vertac*, 841 F. Supp. 884. This appeal followed.[2]

Undisputed Facts

The following summary of facts is largely taken from the district court's statement of undisputed facts.[3] *See id.* at 886-88. During the late 1950s, Reasor-Hill Corp. owned and operated the Jacksonville facility, where it manufactured, among other things, chemical herbicides known as 2,4-D[4] and 2,4,5-T.[5] In December of 1961, Hercules purchased the Jacksonville facility from Reasor-Hill. In 1964, in response to contract solicitation proposals published by the United States, Hercules submitted and won competitive bids to supply the United States with an herbicide known as Agent Orange, to be used as a defoliant in Vietnam. Hercules began producing Agent Orange, a mixture

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2 The United States asserts that this court lacks jurisdiction to consider Uniroyal's arguments on appeal because Uniroyal failed either to join in the other appellants' motions for summary judgment or to oppose the United States' cross-motion for summary judgment. We note, however, that Uniroyal did "adopt by reference pursuant to Rule 10(c) of the Federal Rules of Civil Procedure the responses of the State [of Arkansas], Vertac and Dow to the Motion for Summary Judgment of the United States." *See* Appellee's Supplementary Appendix at 139. That adoption is sufficient to confer appellate jurisdiction, and we have considered Uniroyal's arguments to the extent they are within the proper scope of issues on appeal.

3 Appellants do not argue that the district court erred in stating the undisputed material facts. Rather, they maintain that the district court erred in applying the law.

4 2,4-D is 2,4-dichlorophenoxyacetic acid.

5 2,4,5-T is 2,4,5-trichlorophenoxyacetic acid. The manufacture of 2,4,5-T creates a by-product known as TCDD or dioxin.

of the butyl esters of 2,4-D and 2,4,5-T, at the Jacksonville facility.

From 1964 through 1968, Hercules produced and supplied Agent Orange to the Department of Defense (DOD) under rated contracts or orders and directives issued pursuant to the DPA, 50 U.S.C. app. § 2061 *et seq.* The DPA provides, among other things, that the President has authority to designate a contract or order as a "rated order" which shall take priority over the performance of any other contract or order, on grounds that it is deemed necessary or appropriate to promote the national defense. Rated orders may also require the suppliers of a government contractor to give the government contractor similar priority. A "directive" is an official action taken by the Department of Commerce (DOC) under its regulations. It requires a person to take an action or to refrain from taking an action and may take precedence over a rated or unrated contract, to the extent stated in the directive. The rated orders and directives issued to Hercules were subject to rules promulgated by the Business and Defense Services Administration, a unit of DOC.

The rated contracts contained standardized government contract terms and conditions. The contract specifications, which governed matters such as physical properties of the product, packaging, labeling, and quality control, were mainly developed by the United States Army. Hercules and other manufacturers were allowed some input regarding the contract specifications. While DOD allowed Hercules limited opportunities to negotiate and modify the terms of the contract specifications, the specifications remained substantially dictated by DOD.

The rated contracts also subjected Hercules to the terms of the Walsh-Healey Act, 41 U.S.C. § 35. Under the Walsh-Healey Act, Hercules was required to meet certain health and safety standards. Regulations under the Walsh-Healey Act gave the Department of Labor authority to conduct random inspections

at the Jacksonville facility, which it did on two occasions during the period Hercules was producing Agent Orange.

In 1967, the United states issued a directive ordering Hercules to accelerate its production and delivery of Agent Orange. As a result, Hercules devoted all of its efforts at the Jacksonville facility to producing Agent Orange. When Hercules was still unable to meet the United States' production demands, it contracted for the foreign importation of 2,4,5-T and 2,4-D. The government facilitated this importation by waiving import duties, pursuant to 10 U.S.C. § 2383, which provided for duty-free treatment of emergency war materials purchased abroad.

None of the raw materials used by Hercules for the production of Agent Orange was ever owned or directly supplied by the United States. The United States did, however, issue directives to Hooker Chemical (Hooker), to ensure Hooker's supply of tetrachlorobenzene (TCB) to Hercules and other producers of Agent Orange. The United States also did not hold any financial ownership interest in the land, buildings, tools, machinery, or equipment used by Hercules during the time Hercules was producing Agent Orange. In fact, Hercules protected certain aspects of its Agent Orange production process as proprietary information. No representative of the United States ever hired, fired, disciplined, managed, or trained any Hercules personnel who worked on the production of Agent Orange.

The United States knew or should have known that the production of Agent Orange produced wastes. Some of the wastes generated by the production of 2,4,5-T contained hazardous substances, including dioxin. The rated contracts between Hercules and the United States did not address the manner in which Hercules was to handle wastes generated by the production of Agent Orange. Hercules chose to bury wastes generated by the production of 2,4,5-T on-site, which had been its practice before it began producing Agent Orange for the United States. Hercules chose to bury the wastes without consulting

representatives of DOD or DOC. The United States did not take part in designing, performing, or supervising activities related to the handling, treatment, or disposal of wastes while Hercules owned and operated the Jacksonville facility.

Hercules profited from its sales of Agent Orange to the United States under the rated contracts. After Hercules stopped supplying Agent Orange to the United States, it continued to produce and sell to commercial customers other products manufactured with the use of 2,4-D and 2,4,5-T.

Discussion

We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see. e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695, 699 (8th Cir. 1992). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990). In the present case, the district court held as a matter of law that, under the undisputed facts of the case, the United States cannot be held liable as either an operator or an arranger under 42 U.S.C. § 9607(a)(2) and § 9607(a)(3). *Vertac*, 841 F. Supp. at 890. The district court also held as a matter of law that Hercules is not entitled to immunity under the DPA or implied indemnity from the United States. *Id.* at 891. We agree.

Operator Liability

Under CERCLA, there are four classes of responsible persons who may be held liable for response costs incurred by the United States or another person. 42 U.S.C. § 9607(a). One class includes persons who operated a facility at the time hazardous substances were disposed of at the facility. *Id.* § 9607(a)(2) (owners and operators of facility at time of disposal). This court recently addressed the legal standards for determining an individual's operator liability under § 9607(a)(2) in *United States v. Gurley*, No. 93-2699 (8th Cir. Dec. 28, 1994) (*Gurley*). We determined under the facts of that case that an individual's actual exercise of control over the waste disposal activities conducted at a dump site resulted in personal liability under CERCLA. *Id.*, slip op. at 5-11.

In the present case, we consider the legal standards for determining the government's operator liability under § 9607(a)(2), which we view as similar to corporate liability. As noted in *Gurley*, slip op. at 5-7, the statute itself does not provide much guidance; it simply imposes liability upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The Third Circuit, however, recently addressed this precise issue and held that the United States was an operator under CERCLA in a case involving similar, but not identical, facts to those of the present case. *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc) (*FMC*).[6] Upon review, we agree with the Third Circuit's conclusion that operator liability may result from actual or substantial control exercised by one entity over the activities of another. *Id.* at 843-45. Determining whether an entity has exerted such actual or substantial control

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6 *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc) (*FMC*), had not been decided at the time the district court rendered its decision in the present case.

requires a fact-intensive inquiry and consideration of the totality of circumstances. *Id.* at 845. In the present case, we hold that the United States cannot be held liable as an operator under CERCLA because it did not exercise actual or substantial control over the operations at the Jacksonville facility.

In *FMC*, the Environmental Protection Agency brought a CERCLA action against potentially responsible persons seeking response costs for cleaning up hazardous substances at a facility in Front Royal, Virginia (the Front Royal facility). The owner of the site, FMC corporation (FMC), sought contribution from the United States pursuant to 42 U.S.C. § 9613(f). FMC alleged that the United States was liable as an owner, operator, and arranger under 42 U.S.C. §§ 9607(a)(2) and § 9607(a)(3) because the War Production Board (WPB)[7] exercised control over the manufacture of high tenacity rayon at the Front Royal facility during the 1940s. Following a bench trial, the district court held that the United States was liable as an owner, operator, and arranger. On appeal, the Third Circuit affirmed, discussing only the United States' liability as an operator.[8] 29 F.3d at 843-45. The Third Circuit applied an "actual control" test for operator liability as set forth in its decision in *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993) (corporate liability). *FMC*, 29 F.3d at 843.

Under the "actual control" test, the Third Circuit considered whether the United States had exercised "substantial control" over the production of high tenacity rayon at the Front Royal site. That standard in turn required, at a minimum, "active involvement in the activities" at the Front Royal facility. *Id.* Based upon the specific facts of the case, the Third Circuit

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7 The War Production Board was later subsumed within the Department of Commerce.

8 By an evenly divided vote, the Third Circuit also affirmed, without discussion, the district court's holding that the United States was liable as an arranger under § 9607(a)(3). *FMC*, 29 F.3d at 845-46.

concluded that the United States had exercised actual control over the activities at the Front Royal facility during the relevant time frame. The Third Circuit reasoned as follows:

> In our view, it is clear that the government had "substantial control" over the facility and had "active involvement in the activities" there. The government determined what product the facility would manufacture, controlled the supply and price of the facility's raw materials, in part by building or causing plants to be built near the facility for their production, supplied equipment for use in the manufacturing process, acted to ensure that the facility retained an adequate labor force, participated in the management and supervision of the labor force, had the authority to remove workers who were incompetent or guilty of misconduct, controlled the price of the facility's product, and controlled who could purchase the product. While the government challenges some of the district court's findings, it simply cannot quarrel reasonably with the court's conclusions regarding the basic situation at the facility. In particular, the government reasonably cannot quarrel with the conclusion that the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold.

Id.

A key fact in *FMC* was that American Viscose, the owner of the Front Royal facility at the time high tenacity rayon was manufactured, had been ordered by the WPB to convert its facility to production of high tenacity rayon, rather than the regular textile rayon it had been producing. *Id.* at 836. In other words, American Viscose itself did not choose its product; "the government determined what product the facility would pro-

duce." *Id.* at 843. Thus, the United States was directly and entirely responsible for introducing a new manufacturing process at the Front Royal facility. That manufacturing process generated hazardous substances that were disposed of on-site. Moreover, the United States implemented the required plant conversion by leasing government-owned equipment and machinery and contracting with a third party to install the equipment at the Front Royal plant. *Id.* at 837. By contrast, in the present case, Hercules elected to bid for the Agent Orange government contracts. To the extent Hercules had to change its operations to produce Agent Orange, as opposed to other herbicides using 2,4-D and 2,4,5-T, those changes resulted from its own decision to seek the government's wartime business. *Vertac*, 841 F. Supp. at 886, 890.

Another important fact in *FMC* was that the United states "exerted considerable day-to-day control over American Viscose" during the relevant time period. *FMC*, 29 F.3d at 844. For example, the United States participated in managing and supervising workers, and even appointed a full-time representative to reside at Front Royal to address problems at the facility concerning manpower, housing, community services, and other related matters. *Id.* at 837. By contrast, in the present case, no representative of the United States ever managed or supervised any Hercules personnel during the relevant time period. *Vertac*, 841 F. Supp. at 888. Upon review, we hold that it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange. Moreover, the facts that Hercules was required to comply with the worker health and safety regulations under the Walsh-Healey Act, and that on two occasions inspectors visited the Jacksonville plant to investigate such compliance, are insufficient bases for imposing CERCLA liability on the United States as an operator of the facility. *See, e.g., United States v. Dart Indus., Inc.*, 847 F.2d

144 (4th Cir. 1988) (state environmental agency not an owner or operator of waste site under CERCLA despite allegations that agency issued permits for waste storage, performed inspections, and failed to effectuate a cleanup); *United States v. New Castle County*, 727 F. Supp. 854, 867-70 (D. Del. 1989) (state's regulation of hazardous waste site insufficient to establish operator liability where state did not have a financial or proprietary interest in the site and did not actively participate in daily management and operations of the site).

In sum, the United States was not sufficiently involved, directly or indirectly, in the activities that took place at the Jacksonville facility to constitute actual or substantial control. Accordingly, we hold that, under the facts of the present case, the United States cannot be held liable as an operator of a facility under § 9607 (a)(2).

Arranger Liability

CERCLA also imposes liability for response costs on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(a)(3). This court addressed the legal standards for finding arranger liability under CERCLA in *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986) (*NEPACCO*), *cert. denied*, 484 U.S. 848 (1987), and *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (*Aceto*). Appellants argue that the United States is an arranger under *NEPACCO* and *Aceto* because it had authority to control, and did control, many aspects of the production of Agent Orange. Upon review, we agree with the district court's analysis of this issue.

Liability under § 9607(a)(3) requires, among other things, that the hazardous substances be "owned or possessed by" the person who arranged for the disposal. In *NEPACCO*, we explained that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme. . . . We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA." 810 F.2d at 743. *NEPACCO* involved a question of whether or not a corporate employee could be found to have "owned or possessed" hazardous substances within the meaning of § 9607 (a)(3) by virtue of his specific responsibilities within the corporation, his knowledge of the hazardous nature of substances with which he was dealing, and the specific actions he took. In the present case, we must consider whether or not the United States "owned or possessed" hazardous substances within the meaning of § 9607(a)(3) by virtue of its statutory authority under the DPA and the Walsh-Healey Act, its presumed knowledge that the production of Agent Orange was generating hazardous wastes, and the specific actions it took to facilitate Hercules' production of Agent Orange. Appellants maintain that the United States constructively possessed the hazardous substances disposed of at the Jacksonville facility because the United States had the authority to control, and did control, the product made at the facility and the raw materials necessary to make that product. We disagree.

To begin, we note that a governmental entity may not be found to have owned or possessed hazardous substances under § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances. Our holding in *NEPACCO*, when read in the context of the facts of the case, certainly does not suggest such a broad interpretation. In *NEPACCO*, we concluded that a corporate employee construc-

tively possessed the hazardous substances at issue because he, "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances." 810 F.2d at 743. In the present case, by contrast, the United States did not immediately supervise, or have direct responsibility for, the transportation or disposal of any hazardous substances generated at the Jacksonville facility. *Vertac*, 841 F. Supp. at 887-88.

Appellants maintain, however, that they are not merely relying on the United States' regulatory powers as a basis for asserting arranger liability under *NEPACCO*. They contend that it is the additional contractual relationship between Hercules and the United States, as governed by the DPA, that gives rise to the latter's liability as an arranger. We again disagree. As stated by the district court, "there is no dispute that Hercules actively sought Agent Orange contracts by participating in competitive bidding and that it made a profit from each contract." *Vertac*, 841 F. Supp. at 890. Moreover, "the relationship between the United States and the contractor under the DPA is one of buyer and seller, except that the buyer (i.e., the United States) has the power to require the seller to perform the contract and to give it priority over other contracts." *Id.* Finally, Hercules was given opportunities to negotiate some terms of the contract specifications and, as a result, some of those terms were changed or modified. *Id.* at 886. Thus, while *NEPACCO* certainly suggests that circumstances may exist where a government contract involves sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA,[9] the undisputed facts in the present case do not support such a finding.

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9 *Cf. FMC*, 29 F.3d at 845-46 (affirming without discussion the district court's ruling that the government was liable as an arranger under CERCLA).

Appellants rely, in the alternative, on this court's decision in *Aceto*. In *Aceto*, the appellants, pesticide manufacturers, argued that they could not be liable as arrangers of hazardous waste disposal where the wastes were generated by an independent contractor whom they had hired to formulate technical grade pesticides into commercial grade pesticides. The complaint alleged that the appellants owned the technical grade pesticides used in the formulation, the work in process, and the resulting commercial grade product. 872 F.2d at 1378. On appeal, this court affirmed the district court's denial of the appellants' motion to dismiss, noting that the appellants actually owned the hazardous substances, as well as the work in process. *Id.* at 1381-82. In other words, the complaint alleged that, throughout the production process, the appellants retained actual ownership of the hazardous substances in question. Therefore, a claim of arranger liability had been sufficiently alleged, even though the appellants were never actually involved in the treatment or disposal of the hazardous wastes. *Id.* at 1382.

Appellants in the present case argue that *Aceto* applies because the United States (1) supplied the raw materials to Hercules for the production of Agent Orange by issuing directives to Hooker requiring Hooker to supply TCB to Hercules, giving Hercules authority to enter rated contracts with its suppliers, and waiving import duties for some of Hercules' foreign suppliers, and (2) constructively possessed the hazardous substances and the work in process by having the authority to control the supply of TCB, Hercules' production process, and the end product.

We agree with the district court's determination under *Aceto* that the United States did not supply the raw materials to Hercules and did not own or possess the raw materials or the work in process. *See Vertac*, 841 F. Supp. at 888-89. Although the United States took steps to facilitate Hercules' acquisition of TCB, the United States was never actively involved in

supplying Hercules with any such raw materials. Nor did the United States own or have any financial interest in any of Hercules' suppliers. *Cf. FMC*, 29 F.3d at 837 (government built and retained ownership of sulfuric acid plant adjacent to facility to assure adequate supply of sulfuric acid). The facts simply do not support the conclusion that the United States actually or constructively supplied Hercules with its raw materials. It also cannot reasonably be inferred that the United States constructively owned or possessed the raw materials or the work in process that generated hazardous wastes at the Jacksonville facility. As previously discussed, the undisputed facts establish that the United States' actual involvement in the operations of the Jacksonville facility was sporadic and minimal.

Accordingly, we hold that, under the facts of the present case, the United States cannot be held liable under CERCLA as an arranger of hazardous waste disposal under § 9607(a)(3).[10]

Hercules' immunity and indemnity arguments

Hercules additionally argues on appeal that it is immune from CERCLA liability arising out of its performance of the Agent Orange contracts and that the United States has an implied duty to indemnify Hercules. The district court rejected these arguments in its summary judgment order without discussing its reasons. *Vertac*, 841 F. Supp. at 891. Upon careful review of the undisputed facts and the arguments presented on appeal, we affirm the district court's decision.

Hercules bases its immunity argument on § 707 of the DPA, 50 U.S.C. app. § 2157, which provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly

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10 Our conclusions that the United States is neither an operator nor an arranger under CERCLA obviates the need to address the United States' sovereign immunity arguments.

> or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act [sections 2061 to 2071 of this Appendix], notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act [sections 2071 to 2076 of this Appendix] or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

Hercules argues that the language of § 707 is clear and unambiguous and that nothing in its language supports an interpretation that would exclude Hercules' CERCLA liability, or any other liability, arising out of its performance of the Agent Orange contracts. In response, the United States argues that the language of § 707 is not clear and unambiguous and that the interpretation advanced by Hercules would have the absurd result of allowing a government contractor to violate the laws with impunity, so long as it is performing a rated contract.

In *Hercules, Inc. v. United States*, 24 F.3d 188, 203-04 (Fed. Cir. 1994) (*Hercules*), the Federal Circuit was similarly required to examine the scope of the immunity provided by § 707. The Federal Circuit considered the relationship between § 707 and § 101(a) of the DPA, 50 U.S.C. app. § 2071(a), which authorizes the President to designate certain government contracts for priority over other contracts when necessary or appropriate to promote the national defense. Noting, as a general rule, that statutory provisions enacted together must be read harmoniously, the Federal Circuit reasoned "[t]o hold that section 707 protects contractors against a risk which is greater than that

created by the statute with which it operates would violate this rule." 24 F.3d at 204. Accordingly, the Federal Circuit concluded "the protection afforded by section 707 of the DPA extends no further than the risk imposed by section 101(a) of the DPA." *Id.* We agree. Accordingly, we hold in the present case that § 707 does not shield Hercules from liability it may have under CERCLA arising out of its performance of the Agent Orange contracts because such immunity would exceed the risk imposed by § 101(a).[11] *Accord United States v. General Dynamics Corp.*, 1988 U.S. Dist. LEXIS 17256 (N.D. Tex. June 9, 1988) (§ 707 immunity does not apply to liability under the Clean Air Act).

Hercules separately argues that it is entitled to indemnity from the United States arising out of Hercules' immunity under § 707, the United States' waiver of immunity, and the United States' liability under CERCLA. Because Hercules is not entitled to immunity under § 707, its implied indemnity argument must also fail. In light of our interpretation of § 707, it cannot genuinely be disputed that the United States never implicitly promised to indemnify Hercules for the type of liability at issue in the present case. *See Hercules*, 24 F.3d at 204 (government's use of DPA to issue rated orders for production of Agent Orange did not create an implied-in-fact contractual obligation that government must indemnify contractor for tort liability to third parties).

Accordingly, we hold that Hercules is not entitled to immunity under § 707 of the DPA or implied indemnity from the United States.

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11 "We agree that § 707 "provid[es] a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." *Hercules, Inc. v. United States*, 24 F.3d 188, 203 (Fed. Cir. 1994). However, we do not comment on the extent to which § 707 might provide immunity under other circumstances not presented in this case.

For the foregoing reasons, the order of the district court is affirmed.

A true copy.

Attest:

CLERK,
U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

VERTAC CHEMICAL CORP., ET AL.

Defendants

ORDER

As set forth in previous order, this case is set for trial beginning November 1, 1993. A number of parties have requested a jury trial. Other parties have objected, arguing that the parties are not entitled to a jury trial on the issues pending. The Court has reviewed the submissions and will grant the request for a jury trial. A twelve-person jury will be empaneled, and will decide those issues which are properly to be decided by the jury and will act as an advisory jury with respect to the other issues. F.R.Civ.P. 39(c).[1]

1 The Court need not decide now which issues should be resolved by the jury.

The Court has also reviewed the various trial plans submitted by the parties and will adopt the plan offered by the United States, et al.[2] The Court is persuaded that this plan is best suited to deal with the multiple claims and parties to this action. Thus, the trial will begin with any claims the United States has against Hercules.[3]

The Court has reviewed the motions for summary judgment regarding the liability of the United States under CERCLA. The Court finds that the United States is not liable under Sections 107(a)(2) or 107(a)(3) with regard to the production of Agent Orange. Thus, the motions for partial summary judgment of Vertac, ADPC&E and Hercules against the United States are denied. The motion of the United States against Vertac, Arkansas, Hercules, Dow, Uniroyal, Velsicol and BASF is granted. A more detailed memorandum opinion setting forth the Court's reasoning will be forthcoming.

Several parties have inquired as to the necessity of Local Rule 21 pretrial conference information sheets. The parties are directed to file a modified pretrial conference information sheet which contains a summary of the claims of the parties and a *brief* description of the facts and law that forms the basis for the claims. The information sheet shall be filed by October 20, 1993.

Accordingly, Vertac's and ADPC&E's motion for partial judgment against the United States on CERCLA liability (document number 1170) is denied; Hercules' motion for partial

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2 The Court recognizes that the United States opposes a request for a jury trial. Thus, the United States' proposal is modified to the extent the Court has determined that the case will be tried before a jury, sitting either as the fact finder or in an advisory capacity.

3 The Court will be issuing a ruling on the United States' motion for partial summary judgment against Hercules regarding CERCLA liability before the pretrial conference.

summary judgment as to the claims against the United States (document number 1339) is denied; the United States' motion for summary judgment against Vertac, et al. (document number 1403) is granted; Hercules' and Uniroyal's motions for trial by jury (document numbers 1650 and 1652) is granted; the trial plan proposal submitted by the United States, et al. is adopted.

IT IS SO ORDERED this 7th day of October, 1993.

/s/
George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

VERTAC CHEMICAL CORP., ET AL.

Defendants

MEMORANDUM OPINION AND ORDER

In the present case, the State of Arkansas and Vertac along with Hercules have filed motions for summary judgment asking that the United States be held liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 *et seq.* for its role in the production of Agent Orange.[1] In response, the United States has filed a motion for partial summary judgment asking that the Court find that it is not liable.

1 The State of Arkansas and Vertac filed a Joint motion for summary judgment against the United States. The State and Vertac will be referred to collectively as Vertac.

Hercules and Vertac argue that the United States is liable as an operator under section 107(a)(2) and an arranger under section 107(a)(3) of CERCLA. They argue that the United States' liability arises from the government's authority under the Walsh-Healey Act, 41 U.S.C.§35 *et seq.* and the Defense Production Act of 1950 ("DPA"), 50 U.S.C. app. §2061 *et seq.* during the time the United States purchased Agent Orange from Hercules for use in the Vietnam war.[2] The facts are basically not in dispute, and the relevant ones are set forth below.

SUMMARY OF UNDISPUTED FACTS

Hercules purchased the assets of Reasor-Hill corporation in December, 1961. Reasor-Hill began producing 2,4-D esters and amines in 1955, and 2,4-5-T in 1957. During the period December 1961 through the fall of 1971, Hercules owned and operated the herbicide production facility at Marshall Road in Jacksonville, Arkansas (the "Jacksonville facility.") Shortly after taking over the Jacksonville plant in 1961 and prior to entering into the rated contracts for the supply of Agent Orange, Hercules began burying wastes generated from Reasor-Hill's operations.

From 1964 through 1968, Hercules produced Agent Orange for the United States at the Jacksonville facility. Agent Orange is a mixture of the butyl esters of 2,4,5-trichlorophenoxy acetic acid ("2,4,5-T")and 2,4-dichlorophenoxyacetic acid ("2,4-D"). Hercules produced Agent Orange for the United

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2 The United States used various herbicides for defoliation and crop destruction spraying in Vietnam beginning in 1962. After 1964, Agent Orange, a 50-50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T was one of the most widely used herbicides. "As the war in Vietnam escalated in the mid-1960s, so too the use of herbicides expanded. In 1967, the peak year for herbicide spraying in South Vietnam, 1,687,758 acres were sprayed—85% for defoliation purposes and 15% for crop destruction." *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 777 (E.D.N.Y. 1984)

States pursuant to rated contracts and directives issued under the DPA.

The DPA authorizes the President to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over the performance under any other contract or order, and further authorizes the President to require the acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds capable of performing the contracts. The DPA allows for a penalty to be levied against a private manufacturer in an amount of up to $10,000.00 and imprisonment of up to one year for willful failures to perform any act required by the DPA or any regulation or order under the DPA. 50 U.S.C. §2073.

"Rated orders" are contracts or purchase orders that have a priority rating. There are two levels of priority ratings. The "DX" rating is the higher level of priority rating. The "DO" rating is the lower level of priority rating. Where there is a conflict between the performance of a rated order and an unrated order, the rated order takes precedent.

"Directives" are official actions taken by the Department of Commerce ("DOC") under its regulations. A directive requires a person to take an action or to refrain from taking an action. A directive takes precedence over both rated orders and unrated orders to the extent that such preference is stated in the directive.

Hercules submitted competitive bids, including sales prices, in response to the contract solicitation proposals published by the United States pertaining to Agent Orange. Hercules supplied Agent Orange to the Department of Defense ("DOD") pursuant to rated contracts and directive issued under the DPA. These rated contracts and directives were subject to rules promulgated by the Business and Defense Services Administration ("BDSA"), a primary organizational unit of DOC.

The rated contracts between DOD and Hercules contained standardized government contract terms and conditions set forth in standardized "DO Forms." DOD provided opportunities to Hercules to negotiate at least some of the terms of the contract specifications pertaining to Agent Orange. As a result of these negotiations, DOD changed or modified the terms of various contract specifications.

Hercules made a profit for performing each rated contract for the supply of Agent Orange. Under the Agent Orange contracts, from June of 1964 to May of 1968, Hercules shipped over 2.7 million gallons of Agent Orange to the United States for use in the Vietnam War.

The specifications for Agent Orange were developed by the United States Army. At times, the government received input concerning some specifications from the other services and manufacturers of Agent Orange, including Hercules. Some of these specifications included information regarding physical properties, packing, and quality control instructions. Under several of the contracts for the supply of Agent Orange, Hercules was required to produce Agent Orange under other military specifications.

In March, 1967, the BDSA issued a directive under the DPA to Hercules requiring Hercules to accelerate the delivery of Agent Orange to the United States to a monthly rate of 65,000 gallons beginning April 3, 1967. This monthly rate constituted all of the Jacksonville facility's production capacity.

The directive told Hercules that the tetrachlorobenzene ("TCB") it needed to produce Agent Orange for the United States could be obtained by placing DO rated orders on Hercules' TCB suppliers, including Hooker Chemical. In connection with the March, 1967 directive, the BDSA told Hercules to inform the BDSA immediately if Hercules had any difficulty obtaining the raw material it needed to produce the Agent Orange.

Hercules was unable to meet the production demands placed upon it by the Directive and at the same time maintain its share of the commercial 2,4-D market. Hercules contracted for the import or 2,4,5-T and 2,4-D in order to comply with its contracts with the government. The government facilitated these imports of 2,4,5-T and 2,4-D by waiving, pursuant to 10 U.S.C. §2383 (providing for duty-free treatment of emergency war materials purchased abroad), all import duties usually charged on the shipment of goods from abroad. These imports could be utilized on the Agent Orange contracts (but only on those contracts), thereby freeing up some 2,4-D production.

The United States did not directly supply Hercules with TCB or any other raw material. The United States did not own or physically possess any TCB or any other raw material which Hercules obtained, by the placement of rated orders, from Hooker Chemical Corporation or any other supplier.

The United States, beginning in 1967, issued directives to Hooker requiring Hooker to supply the necessary raw materials for the production of Agent Orange to the suppliers, including Hercules.

The United States held no financial ownership interest in the land, buildings, tools, machinery or equipment used by Hercules during the period of time in which Hercules produced Agent Orange. Hercules considered parts of its process, including the toluene extraction process, for the production of Agent Orange as proprietary information.

The active ingredients for 2,4,5-T and 2,4-D sold to the Department of Defense ("DOD")were the same as those contained in some commercial 2,4,5-T and 2,4-D products. However, the 2,4,5-T and 2,4-D products sold commercially by Hercules were sold in a diluted form. The product sold to the government was sold in an undiluted form.

After termination of the contracts with DOD for the supply of Agent Orange, Hercules manufactured and sold various formulations of esters and salts of 2,4,5-T and 2,4-D to commercial customers.

The United States admits that the production of Agent Orange generates wastes and that it knew or should have known that. The parties also agree that many of the wastes generated by Hercules from the production of 2,4,5-T sold to DOD and to commercial customers contained "hazardous substances" within the meaning of CERCLA. Hercules buried wastes generated from the production of 2,4,5-T sold to DOD and to commercial customers at the Jacksonville facility. These wastes are still located at the facility.

There is no dispute that the contracts did not require Hercules to bury the wastes or to handle them in any particular manner. Hercules made the decision to bury the wastes at the Jacksonville facility, without consulting with DOD or DOC personnel. Furthermore, the DOD or DOC took no part in designing, performing, or supervising activities relating to the handling, treatment or disposal of wastes during the time Hercules owned and operated the Jacksonville facility.

In addition, during the time Hercules owned and operated the Jacksonville facility, the United States did not hire, fire, discipline, manage or train any Hercules personnel who worked in the Agent Orange production process.

"OPERATOR" AND "ARRANGER" LIABILITY UNDER CERCLA

Vertac and Hercules assert that the United States is liable as an operator under section 107(a)(2) of CERCLA. That section imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated the facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Similarly, Vertac and Hercules assert

that the United States is liable as an arranger under section 107(a)(3) of CERCLA, which imposes liability on any person who arranged for disposal of hazardous substances owned or possessed by the person at any facility from which releases have occurred. Their argument relies on the "authority to control" they claim the United States had with regard to the disposal of the wastes under the DPA and Walsh-Healey Act.

Under Section 107(a)(2), a non-owner of the property is liable as an operator if the person either (1) actually participated in the operations of the facility; or (2) actually exercised control over, or was otherwise intimately involved in the operations of the corporation immediately responsible for the operation of the facility. *Levins Metals v. Parr-Richmond Terminal*, 781 F. Supp. 1454, 1456 (N.D. Cal. 1991).

Two alternative bases exist for arranger liability in this context. In *United States v. Northeastern Pharmaceutical & Chemical Co.* ("*NEPACCO*"), 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 948 (1987), the court imposed arranger liability on persons who actually controlled or had authority over the disposal of hazardous substances even though they did not own or physically possess them. Thus, arranger liability could be imposed where the defendant had actual authority to control the disposal of hazardous substances.

In the absence of actual involvement in the disposal of the hazardous substances, arranger liability has been found where the defendant retained ownership or control or the hazardous substances throughout the production process that generated the hazardous waste. In *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), the court denied a motion to dismiss where the defendants—pesticide manufacturers—had owned and possessed the hazardous substances prior to arranging for disposal. The manufacturers contracted with Aidex Corporation—a formulator of chemicals to blend and package their pesticides. It was during Aidex's handling of the

raw materials owned by the manufacturers that there were spills of the materials at the Aidex.

The Eighth Circuit held that arranger liability could be inferred where (1) the person owned the hazardous substances or supplied them to another person who processed them and, thereafter, disposed of at least some of the hazardous substances; and (2) the person owned or controlled the hazardous substances during the work in process; and (3) the generation and disposal of hazardous substances were inherent in the production process.[3] *See Jones-Hamilton v. Beazer Materials & Services*, 959 F.2d 126, 131 (9th Cir. 1992) (arranger liability could be found where defendant retained ownership of the materials it provided, the materials provided included hazardous substances, and the contract contemplated a small amount of spillage of the hazardous materials).

Thus, to impose arranger liability on the United States arising from its purchase of Agent Orange, Vertac and Hercules must prove either (1) under *NEPACCO*, that the United States had the actual authority over the disposal of hazardous substances at the Hercules plant, or (2) under *Aceto* that the United States supplied the raw materials, and owned or controlled the

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3 Dow, in its response to the cross motions for partial summary judgment, argues that the United States has eliminated a third element in its analysis of *Aceto*. That is, the United States construes *Aceto* as requiring ownership of raw materials, the work in process, and the final products, without any authority, involvement, or direction over the process resulting in the disposal of hazardous substances, to be sufficient to confer arranger liability. Dow contends that arranger liability under *Aceto* requires a finding that defendants directed and controlled the process under which the hazardous substances were generated.

The Court need not decide, at this time, whether the narrower standard urged by Dow should be applied in this instance. The uncontested facts reveal that the United States neither owned nor controlled the work in process, and therefore, it is not liable even under the broader standard sought by the United States.

work in process, and that the generation of hazardous substances was inherent in the production process.

The undisputed facts in the case reveal that the United States cannot be held liable as either an operator or an arranger. There is no evidence that the United States actually participated in the actual management or daily operations of the facility. The United States neither supplied the raw materials used to make Agent Orange nor did it own or possess the raw materials. It did not dictate the manner in which the wastes were to be disposed or nor did it in any way control the disposal of those wastes.

There is no dispute that Hercules' contracts with the United States subjected it to the terms of the Walsh-Healey Act. The Act provides for government regulation of worker safety and health practices. It provides that no part of a government contract subject to the Walsh-Healey Act will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under the contract be manufactured or fabricated in any plants or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees performing the contract.

Walsh-Healey inspectors visited the plant for the limited purpose of investigating occupational safety and health hazards that could potentially harm Hercules employees. The inspectors did not assume any management or control over Hercules waste disposal activities.

The Walsh-Healey Act did not give the Department of Labor ("DOL") inspectors any authority over Hercules' disposal of hazardous waste. The DOL had the authority only to issue citations for worker health and safety violations. Indeed, the DOL issued two Notices of Violation to Hercules. In October of 1968, a DOL safety engineer found a number of safety violations upon the inspection of the plant. The DOL issued a "Notice of Violation" outlining the deficiencies. One month later, an industrial hygienist with the DOL conducted a follow-

up inspection. Following his inspection, the DOL served Hercules with another "Notice of Violation." Hercules responded to both notices and took appropriate corrective measures to remedy the problems.

Of import is that DOL had no authority to control the manner in which the contractor remedied the problem. Thus, even assuming that the inspector found problems with Hercules' disposal of wastes, he or she could only issue a citation. The manner in which Hercules dealt with the problem, or how it intended to treat or dispose of its wastes, was left to its discretion.

The Court cannot find, based on the undisputed facts, that the authority of the United States to regulate the working conditions of the employees at the plant under the Walsh-Healey Act gave the United States the authority to control the waste disposal activities required for liability under CERCLA.

Hercules and Vertac argue that the DPA gave the United States pervasive control over virtually all aspects of Hercules' operations and business at the Jacksonville plant. Such an attempt to inject the element of "substantial control" into performance of contracts under the DPA must be rejected.

Section 101 of the DPA gives the President authority to require companies to accept and perform any contracts and orders that the President deems necessary or appropriate to promote the national defense, and to require that companies give priority to the performance of such contracts over the performance of other contracts or orders. 50 U.S.C. app. § 2071. The DPA does not give the United States the authority to take over the plant, or to control the contractor's operations and activities. Rather, the relationship between the United States and the contractor under the DPA is one of buyer and seller, except that the buyer (i.e., the United States) has the power to require the seller to perform the contract and to give it priority over other contracts.

Hercules also argues that it was compelled to perform the Agent Orange contracts under the DPA. A similar argument was rejected in *Ryan v. Dow*, 781 F. Supp. 934, 950 (E.D.N.Y. 1991). There, Agent Orange manufacturers (including Hercules) sought removal to federal court of a tort action brought against them by civilians in Vietnam during the war. While the court recognized that the manufacturers of Agent Orange were compelled to deliver the product to the United States, the court stated, in relevant part:

> They [the manufacturers] are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants. . . . The government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries.

Furthermore, the Court cannot find under the circumstances that the degree of compulsion asserted by Hercules existed. There is no dispute that Hercules actively sought Agent Orange contracts by participating in competitive bidding and that it made a profit from each contract. There is also no dispute that Hercules sold herbicides similar to Agent Orange both prior to and after the contracts with the government. *See Ryan v. Dow Chemical*, 781 F. Supp. at 950 ("The government bought the chemical components for Agent Orange and other defoliants as existing products privately developed and used them in mixtures which were derived from defendants' standard recipes. Thus, the 'compulsion' under which the defendants operated predominantly concerned marketing rather than design and manufacture.")

Hercules and Vertac make much of the "authority" to control. However, their attempt to impose liability on the

United States based merely on an "opportunity or ability to control" Hercules' waste disposal practices must be rejected. In *General Electric Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 286 (2nd Cir. 1992), the court refused to accept a similar argument. The court concluded "that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision." The court further noted that courts holding defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of the waste. "The most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution." *CPC International, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989) (finding that "mere regulatory activities will not subject a state agency to liability as an owner-operator.")

The Court finds that the United States did not have authority over or involvement with Hercules' operations and decisions concerning the plant and the disposal of wastes. Such authority or involvement cannot be conferred from either the Walsh-Healey Act or the DPA. As such, the Court finds that the United States is not liable as an arranger or operator under CERCLA for its role in the production of Agent Orange.[4]

The Court has reviewed the remaining arguments asserted by Hercules and Vertac and finds that they are without merit. In particular, the Court finds that Hercules is not entitled to immunity under section 707 of the DPA or to indemnity.

Accordingly, the motions for partial summary judgment of Vertac and ADPC&E (document number 1170) and Hercules

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4 The Court finds that questions of fact exist concerning the United States liability as an "owner" for the Arkansas Ordnance plant during the World War II period.

(document number 1339) are denied; the motion for summary judgment against Vertac, et al. (document number 1403) is granted.

IT IS SO ORDERED this 12th day of October, 1993.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

JUDGMENT

Pursuant to the Order entered this date, final judgment is entered pursuant to Rule 54(b) on the claims against the United States regarding production of Agent Orange, in particular, the Order granting the United States' motion summary judgment and denying the motions for partial summary judgment of Vertac, ADPC&E and Hercules.

IT IS SO ORDERED this 1st day of March, 1994.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-80-109

UNITED STATES OF AMERICA

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

Civil No. LR-C-80-110

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

Plaintiff

v.

VERTAC CHEMICAL CORP., ET AL.

Defendants

ORDER

Pending before the Court is the motion of the Arkansas Department of Pollution Control and Ecology ("ADPC&E")and Vertac for entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on the Agent Orange claims against the United States.

On October 12, 1993, the Court granted the United States' summary judgment motion on the Agent Orange CERCLA liability claims. With the settlement between the ADPC&E, Vertac and the United States of the non-Agent Orange claims, all claims brought under CERCLA against the United States will have been resolved.[1]

1 The settlement covers claims not related to the Agent Orange claims, that is, the United States' operation of an Army Ordnance Plant at the Vertac

No one disputes that all claims against the United States have been resolved. Hercules opposes the entry of a Rule 54(b) order. It contends that the request of Vertac and ADPC&E is premature. It asserts that the Court should consider the issue of appellate review at one time; that is, when all issues involving the liability of all parties are resolved.

While Hercules' argument ostensibly appears reasonable, it must be rejected. Appellate review of the liability of various parties may not be automatic. Review will need to be sought under 28 U.S.C. §1292(b). Such review requires certification by the Court, and acceptance by the appellate court. Thus, appellate review of all liability issues at one time will not necessarily be certain or assured.

The Court must determine whether certification of the Agent Orange claims under Rule 54(b) is proper. In so doing, the Court "must first determine that it is dealing with a 'final judgment.' It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980).

Here, the order granting summary judgment on the Agent Orange claims meets the definition of a final judgment with respect to the claims against the United States. It resolves the United States' liability under CERCLA for its role in the production of Agent Orange.

Having found that the order pertaining to the production of Agent Orange suffices as a final judgment, the Court must determine whether there is any just reason for delay. In deciding whether there are no just reasons to delay, the court "must take into account judicial administrative interests as well as the

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Site during World War II; the United States' transactions with Vertac during the early 1970s; and various claims involving the Little Rock Air Force Base.

equities involved." The Court may consider "such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id* at 8. *See also In re National Smelting of New Jersey, Inc. Bondholders' Litigation*, 695 F. Supp. 796, 798 (D. N.J. 1988) (*Curtiss-Wright* suggests balancing of relative hardships. First, court must weigh relative prejudice that nonmovant party would experience if certification granted against hardship movant would fact if certification denied. Second, court must determine whether certification would foster the interest of sound judicial administration).

It appears that no hardship would result to the United States or the other parties whose claims are yet to be resolved if certification is granted. As stated above, all claims against the United States as a responsible party under CERCLA have been resolved. The Agent Orange claims are separate and independent of other claims and will not require the appellate court to consider the same legal or factual issues in a subsequent appeal. Furthermore, the appellate court's decision on the Agent Orange claims could not be mooted by subsequent action in the remaining phases of this litigation.

Vertac also argues that it will be prejudiced by a delay in the appeal. While the court is of the opinion that its decision was correct in granting the United States' motion for summary judgment, the Court recognizes that an early appellate review of Vertac's claim would be beneficial.

Accordingly, the motion for entry of final judgment under Rule 54(b) on the Agent Orange claims against the United States is granted. Judgment will be entered accordingly.

IT IS SO ORDERED this 1st day of March, 1994.

/s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

SEAL **SEAL**

DEFENSE CONTRACT AUDIT AGENCY
CAMERON STATION
ALEXANDRIA, VA 22304-6178

14 October 1982

PAD 730.31/92-6 92-PAD 163 (R)

MEMORANDUM FOR REGIONAL DIRECTORS,
DCAA DIRECTOR, FIELD DETACHMENT

SUBJECT: Audit Guidance on the Allowability of Environmental Costs

The Director of Defense Procurement (DDP), determined that environmental costs should be treated as normal business expenses. The enclosed guidance paper on the allowability of environmental costs was jointly developed with the office of the Director of Defense Procurement. This guidance is based on the current rules in effect. If new cost principles addressing environmental costs are established, new audit guidance will be issued at that time. The guidance in this paper should be applied in auditing all incurred costs and forward pricing proposals. DDP is separately distributing the guidance paper to the DoD acquisition community.

Field audit office personnel should direct any questions regarding this memorandum to personnel in the regional office. If regional personnel are unable to answer or have questions of their own, they should call Mr. H. Clyde Wray, Program Manager, Accounting Policy Division, at (703) 274-6343.

S/
Michael J. Thibault
Assistant Director
Policy and Plans

Enclosure:
Guidance Paper on Environmental Costs

DISTRIBUTION: C

Guidance Paper on Environmental Costs

Summary

Environmental costs are normal costs of doing business and are generally allowable costs if reasonable and allocable. Some environmental costs must be capitalized when the effort improves the property beyond its acquisition condition or under certain circumstances when the costs are part of the preparation of the property for sale. If the environmental clean up efforts resulted from contamination caused by contractor wrongdoing, the clean up costs are not allowable. Clean up costs paid or projected are usually only estimates of the contractor's true net costs after future recoveries. The costs should be treated as contingent costs subject to FAR 31.205-7, Contingencies, and, for costs paid and later recovered, 31.201-5, Credits.

Types of Environmental Costs

Environmental costs include costs to prevent environmental contamination, costs to clean up prior contamination, and costs directly associated with the first two categories including legal costs.

Applicable Cost Principles

The costs incurred to clean up environmental contamination are considered to be normal business expenses. The primary cost principles applicable to environmental costs are FAR 31.201-2, Allowability; 31.201-3, Reasonableness; and, 31.201-4, Allocability. Other cost principles applicable in specific circumstances include FAR 31.201-5, Credits; 31.205-3, Bad Debts; 31.205-7, Contingencies; 31.205-15, Fines and Penalties; and 31.205-47, Costs Related to Legal and Other Proceedings.

Normal Business Expense

Normal business expenses are those expenses that an ordinary, reasonable, prudent businessperson would incur in the course of conducting a competitive for-profit enterprise. In the context of environmental costs, normal business expenses are measured by the actual costs incurred in the period. Not all normal business expenses are allowable for Government contract costing purposes. The costs must also be reasonable in amount, allocable to Government contracts, and not be specifically unallowable under Government costs principle provisions.

Reasonableness

The key concept for reasonableness of environmental costs (both preventive and remedial) is that the methods employed and the magnitude of the costs incurred must be consistent with the actions expected of an ordinary, reasonable, prudent businessperson performing non-Government contracts in a competitive marketplace. A Government contractor should take measures to prevent or reduce contamination which a prudent businessperson would pursue to reduce its environmental costs.

Determination of reasonableness of clean up costs also requires an examination of the circumstances of the contaminating events. Contractors should not be reimbursed for increased costs incurred in the clean up of contamination which they should have avoided. In order to be allowable, contamination must have occurred despite due care to avoid the contamination, and despite the contractor's compliance with the law. Increased costs due to contractor delay in taking action after discovery of the contamination are not allowable. For forward pricing purposes, the costs should be net of reasonably available recoveries from insurance which would offset the clean up costs.

Allocability of Environmental Costs to Government Contracts

Costs incurred to prevent environmental contamination will generally be allocated as an indirect expense using a causal or beneficial base. Costs to clean up environmental contamination caused in prior years will generally be period costs. In accordance with CAS 403 clean up costs should be allocated to the segment(s) associated with the contamination which in turn should allocate the costs to contracts as part of the segment residual G&A costs under CAS 410.

Costs from a Contractor's Previous Site

If costs arise from a site the contractor segment previously occupied, the costs for clean up would usually be allocated to the segment's site where the work was transferred. However, if the segment is closed with none of its former work remaining within the company, the costs would generally not be directly allocable to other segments of the business. There are many possible variations for the cost accounting treatment of environmental costs for a closed segment, depending on the facts of the particular situation. Information we would consider includes:

1. Are any aspects of the closed segment's business being continued by the remaining segments?

2. Is the site still owned by the contractor? If it is, what is its current use?

3. If the site is not now owned by the contractor, what were the terms of the sale in relation to environmental costs? The contractor may have retained environmental clean up liability in exchange for a higher sale price or the buyer may have accepted full liability in exchange for a lower purchase price.

Each closed segment case must be reviewed based on its own facts to determine if the costs incurred for the closed segment

should be directly allocated to other segments, be allocated as residual home office costs, or be treated as an adjustment of the extraordinary costs associated with the closing of the segment.

Capitalization of Environmental Costs

Generally Accepting Accounting Principles in the Emerging Issues task Force (EITF) Issue No. 90-8 indicates that environmental costs would normally be expensed in the period unless the costs constitute a betterment or an improvement, or were for fixing up property held for sale. Betterments and improvements which exceed the contractor's capitalization threshold must be capitalized. Costs of fixing up a property for sale are generally considered to be part of the sales transaction, if realizable from the sale. It would be unreasonable for the Government to accept as current period costs, expenditures which increase the value of contractor assets; accordingly, these costs should be capitalized for Government contract costing purposes. The EITF discusses situations where capitalization of the expenditures may be appropriate.

First, cost incurred to clean up a site should be capitalized if it improved the property beyond the original condition of the property at acquisition. The costs incurred to restore a property to its acquisition condition are generally expensed unless they extend the property's useful life. Second, costs incurred to fix up property held for sale are to be capitalized, if such costs are realizable from the sale. A contractor may be required to incur contamination clean up costs far in excess of any amount reasonably realizable upon sale. In the case of costs in excess of realizable costs, the excess amounts are expensed or capitalized depending on whether they improved the property beyond the property's condition at acquisition. Third, costs incurred to prevent future contamination would have an economic value in more than one period and should be amortized over their useful life. Capital assets purchased or constructed to prevent future

contamination must be capitalized consistent with CAS 404 and GAAP.

Examples:

1. A contractor acquires property which was contaminated by a previous owner. Clean up costs are capitalized as an improvement. Costs of ground and water clean ups are increases to the book value of the land.

2. A contractor cleans up contamination from its own operations since acquiring the property. If the property is being held for continuing use, the costs are expensed as period costs.

3. If a contractor incurs $80 million dollars in costs to clean up a site which is being held for sale and has a book value of $50 million dollars, so that it can be sold for $500 million dollars the $80 million is realizable and should be capitalized. If the sale price had been $50 million, none of the $80 million would be realizable and it should be expensed in the period.

4. Costs which benefit future periods by preventing future environmental contamination should be capitalized and written off over the future periods.

Responsibility for Clean Up as Potentially Responsible Party

The environmental laws usually require each Potentially Responsible Party (PRP) for contamination at a site to be individually liable for the complete clean up of the site. The allowable environmental cost should only include the contractor's share of the clean up costs based on the actual percentage of the contamination attributable to the contractor.

If the Government accepted cost based on ability to pay, a Government contractor could end up billing a disproportionate share of the clean up costs to Government contracts instead of recovering the excess payments from other PRPs. If the Government contractor pay a disproportionate amount, the funds

will just transfer from one Government appropriation to another, with some PRPs not paying their share.

Where the contractor paid for more than its share of the site clean up, the contractor receives a right of contribution (or subrogation) against the other PRPs who did not make an appropriate contribution to the clean up effort. If the contractor pays out more than its share of clean up costs, it is up to the contractor to exercise its contribution rights to collect the amount over its share from the other PRPs who did not pay their share.

If a contractor cannot collect contribution or subrogation claims from other PRPs, the uncollected amounts are, in their essential nature, bad debts. Bad debts and associated collection costs, including legal fees, are unallowable costs (FAR 31.205-3 and 31.204(c)).

Insurance Recovery for Environmental Costs

The insurance industry does not currently consider environmental contamination an insurable risk (at a reasonable cost) in most circumstances. The major exception is a sudden accidental contamination, such as an oil tanker spill resulting from a collision. If such insurance is available and reasonably priced, its cost would be allowable.

However, some courts have found that policies written before the insurance industry began to exclude environmental coverage do afford coverage for environmental damages. Any insurance recoveries for a contamination clean up will be applied as credits against any costs which were or would be otherwise allowable for that clean up effort.

Many environmental contamination events now generating costs were insured, either under specific environmental impairment or comprehensive general liability coverages, before the insurance industry developed its current underwriting exclusions. It is the earlier insurance policies which are the source of

the potential claims. Most insurance companies are contesting the claims and when payments are made, they are based on partial settlements or after lengthy legal battles. Where a claim is possible and economically feasible, the contractor should pursue it. In any case, the Government should inquire about the existence of environment contamination policies and comprehensive general liability policies which do not contain environmental clean up cost exclusions. The kind and amount of policies in effect from the time of the contamination to the current date are significant for the purposes of negotiating costs and prices for Government contacts. The contractor's support for proposed clean up costs should include a description of any insurance claim the contractor may have which could reduce the ultimate liability. The amount and timing of these claims for contract costing is a potential subject for negotiation which should be addressed by the auditor and ACO.

Payments to Third Parties Due to Fault Based Liabilities

Examples of liability to third parties include health impairment, property damage, or property devaluation for residents or property owners near a contaminated site. These third party claims arise from legal theories of tort and trespass, and losses from such claims would be unreasonable in nature for payment on a Government contract. In the absence of a specific court finding of tort or trespass by the contractor, the facts of each case should be carefully examined to determine if the contractor payments are none-the-less based on those or other fault based legal theories.

Environmental Wrongdoing

If environmental clean up costs are the result of contractor violation of laws, regulations, orders or permits, or disregard of warnings for potential contamination, the clean up costs including any associated costs, such as legal costs, would be unreasonable and thus unallowable. Fines or penalties are expressly

unallowable under FAR 31.205-15 and any costs of legal proceedings where a fine or penalty could be imposed are covered by FAR 31.205-47. (Note, the incurrence of clean up costs to correct environmental contamination is not a penalty; it is a legal obligation.) However, most of the laws do not require the contractor to be guilty of violation to enforce contractor payment for clean up costs. Therefore, it is rare for Government agencies to bring criminal, or even administrative, charges for contamination. Contractors should be requested to provide documents sufficient to allow a determination as to how the contamination occurred.

Advance Agreements

There are many areas of judgment involved in the determination of allowability for environmental costs. It is necessary for the auditor and the ACO to coordinate closely during the review. Advance agreements should be considered to facilitate negotiations with the contractor.

Ideally, the Government wants to negotiate costs and prices based on the net environmental costs after application of insurance claims. At the time that environmental costs are being incurred, it may not be possible to reasonably estimate what the net costs will be. Even where it is settled that a contractor will be required to clean up a prior contamination, it is rare that projections of the costs necessary to complete the project can be made with a reasonable degree of certainty. Due to the uncertainty of the cost projections and the uncertainty of future recoveries from the insurance companies, environmental clean up costs are contingent costs subject to FAR 31.205-7 for both incurred cost settlements and forward pricing. Acceptance of the costs may require some form of agreement to protect the Government's interest. Any agreement to accept costs for clean up or the costs of insurance recovery efforts as current expenses should also provide expressly for Government participation in any insurance claim recoveries.

United States General Accounting Office

GAO

Fact Sheet for Congressional Requesters

June 1992

DOD ENVIRONMENTAL CLEANUP

Information on Contractor Cleanup Costs and DOD Reimbursements

[SEAL]

GAO/NSIAD-92-253FS

GAO

United States
General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-246822

June 26, 1992

The Honorable John Conyers, Jr.
Chairman, Committee on Government Operations
House of Representatives

The Honorable Barbara Boxer
House of Representatives

In response to your request, this fact sheet provides information on the environmental cleanup costs associated with the production of military goods and Department of Defense (DOD) reimbursements to large defense contractors for such costs. In a subsequent report, we will address the results of various case studies and other related issues.

Results in Brief

Although DOD does not collect information on defense contractors' past and future cleanup costs or reimbursements, substantial amounts of data may be available to DOD. Our inquiries to DOD's Corporate Administrative Contracting Officers for the 15 largest defense contractors indicated most of them had at least partial information on past and future cleanup costs. DOD is

testing a program that could help collect some of the data.

The data we obtained indicate that 10 contractors have already incurred investigation and initial cleanup costs totaling nearly $300 million. As to future costs, we obtained at least partial projections of cleanup costs that, in total, range from $0.9 billion to $1.1 billion.

Four of the 15 contractors reported receiving DOD reimbursements totaling about $59 million. Future DOD payments to contractors could increase significantly after long-term cleanup efforts begin. Four contractors have filed claims with DOD, and others may file claims in the future.

Background

The Environmental Protection Agency is charged with implementing various environmental laws. It has developed implementing regulations that outline, for example, cleanup requirements and selection and approval procedures for remedial actions.

Some defense contractors are among those being held financially responsible for the environmental cleanup of sites used for the production of military goods as well as sites used to dispose of hazardous waste generated by the production of those goods. The contractors may be able to pass the cost of cleanup on to the federal government. The Federal Acquisition Regulation, which governs the allowability of costs under gov-

ernment contracts, does not specifically address environmental cleanup costs. Generally, a cost is allowed under the regulation if it meets criteria for reasonableness, allocability, and compliance with cost accounting standards and contract terms.

DOD is currently developing an environmental cost principle to provide more definitive criteria for determining the allowability of environmental cleanup costs. Implementation of the cost principle is not expected before the end of 1992.

Past and Future Environmental Cleanup Costs

Substantial data on past and future environmental cleanup costs may be available to DOD. Our inquiries to 15 contracting officers showed that 10 individual contractors' estimates of past costs ranged from $0.8 million to $105 million and totaled almost $300 million. Projections of future cleanup costs from 9 of the 15 contractors indicate that significant expenditures will be necessary to complete long-term cleanup efforts. Individual projections ranged from $4.5 million to $305 million. In the aggregate, future cleanup costs were estimated to be between $0.9 billion and $1.1 billion.

Past cleanup expenditures have included such activities as site investigations, mitigation of existing damage, and legal costs. At least eight contractors expect expenditures to increase significantly after full-scale cleanup efforts are initiated. One contractor, for example, advised us that it is

spending $9 million for investigation of one site through 1992 and projected that another $91 million would be needed to construct and operate ground water treatment facilities for full-scale cleanup of this site. Likewise, another contractor estimated that it had spent $14 million on site investigation and initial cleanup and estimated future costs of $110 million to complete cleanup efforts.

Two contractors reported future costs as a range of possible costs, reflecting the difficulty in making long-term cost projections when environmental laws, cleanup standards, and technology are subject to change. Because of these uncertainties, most cost estimates are projected for only 2 to 4 years. Only one contractor provided a long-term estimate of 25 to 45 years.

These past costs and projections are conservative because some contractors could provide only partial information. For example, one contractor may be responsible for environmental cleanup at 100 sites involved with DOD contracts but could provide only partial information on 29 of the sites in the available time. Another contractor reported cleanup costs for approximately 100 sites but was unable to isolate the costs for sites involved with DOD contracts.

According to some contractor officials, projected environmental cost information is sensitive and public release of the information could affect their business competitive-

ness or ongoing litigation with insurance companies and others.

DOD does not have a system for collecting past and projected environmental cleanup costs that its contractors may claim. However, DOD is testing a Defense Corporate Executive program, which could provide more effective overview of corporate-wide activities and costs, including those related to environmental issues.

DOD Payments for Cleanup

Four of the 15 contractors reported that DOD had made payments ranging from $0.5 million to $51.8 million for at least part of their cleanup costs. These payments totaled about $59 million. Future payments to contractors may increase after the contractors begin more extensive cleanup efforts.

Further DOD payments could increase in the future as more contractors seek reimbursement. Only 4 of the 15 contractors have filed claims for reimbursement with DOD, but others have not ruled out filing claims in the future.

Scope and Methodology

We requested information from DOD on past and future environmental cleanup costs and the amount of reimbursements expected to be made; however, DOD stated it could not fulfill our request. We then contacted DOD Corporate Administrative

Contracting Officers at the 15 largest defense contractors of 1991, who in some cases contacted contractor officials to provide the information requested. We did not verify the cost information obtained for the 15 contractors. We conducted our work in April and May 1992.

As you requested, we did not obtain fully coordinated DOD comments on a draft of this fact sheet. However, we discussed the information in this fact sheet with DOD program officials and incorporated their comments where appropriate.

Unless you publicly announce its contents earlier, we plan no further distribution of this fact sheet until 14 days after its issue date. At that time, we will send copies to other congressional committees; the Secretary of Defense, and the Director of the Office of Management and Budget. We will also make copies available to others upon request.

Please contact me at (202) 275-4268 if you or your staffs have any questions concerning this fact sheet. Major contributors are listed in appendix I.

/s/ Nancy R. Kingsbury

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Supreme Court, U.S.
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Nos. 94-1557 and 94-1800

In the Supreme Court of the United States

OCTOBER TERM, 1994

HERCULES INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States may be held liable under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), as a person that "operated," or "arranged for [the] disposal * * * of hazardous substances" at, a facility used by petitioner Hercules Incorporated to manufacture the defoliant Agent Orange for sale to the government.

2. Whether Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, provides petitioner Hercules with immunity from, or requires the United States to indemnify it for, liability under CERCLA for environmental contamination caused by its manufacture of Agent Orange.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1557

HERCULES INCORPORATED, PETITIONER

v.

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No. 94-1800

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18)[1] is reported at 46 F.3d 803. The opinion of

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[1] Citations are to the appendix to the petition in No. 94-1557.

the district court (Pet. App. C1-C13) is reported at 841 F. Supp. 884.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1995. The petition for a writ of certiorari in No. 94-1557 was filed on March 21, 1995, and the petition in No. 94-1800 was filed on April 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit against petitioners Hercules Incorporated and Vertac Chemical Corporation, among others, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the cost of remedying environmental contamination at a former chemical manufacturing site located in Jacksonville, Arkansas. These petitions arise out of the denial of petitioners' motions seeking summary judgment that the United States is jointly liable for the costs at issue under CERCLA, and that Section 707 of the Defense Production Act of 1950, 50 U.S.C. App. 2157, either shields petitioner Hercules from liability or requires that the United States indemnify Hercules for liability incurred by reason of its use of the Jacksonville site to manufacture the herbicide Agent Orange for sale to the government. The district court granted the government's cross-motion for summary judgment that the United States was not liable as an "operator" or "arranger" with respect to the Jacksonville facility, and that the Defense Production Act did not provide for the immunity or indemnity claimed by Hercules. The court

entered final judgment on those issues under Fed. R. Civ. P. 54(b), and the court of appeals affirmed.

1. The 93-acre manufacturing site involved in this case has been on the Environmental Protection Agency's national priority list since 1983. 40 C.F.R. Pt. 300, App. B (1993); see also *United States* v. *Vertac Chemical Corp.*, 489 F. Supp. 870, 873-874 (E.D. Ark. 1980). Petitioner Hercules acquired the property and its manufacturing facilities in December, 1961, and continued to use it to manufacture the herbicides 2,4-D and 2,4,5-T. Pet. App. A3. Shortly after purchasing the property, Hercules began disposing of waste left by the prior owner by digging trenches on the property, pushing the drums of waste into them, covering them with soil, and compacting the buried drums by repeatedly running over them with a bulldozer. Pet. App. C2; C.A. App. 2611 (Hercules Fact ¶ 142). Hercules used the same disposal practices during the ten years that it produced herbicides at the facility. Pet. App. A5. Petitioner Vertac's corporate predecessor began leasing the property from Hercules in 1971, and Vertac purchased it in 1976. Vertac closed the facility in 1986.

The manufacture of 2,4,5-T produces small amounts of a highly toxic by-product known as dioxin. Pet. App. A3 n.5. Early production processes used at the Jacksonville site incorporated most of the dioxin into the finished product, which was then shipped elsewhere. Petitioner Hercules later changed its production process, however, to remove the dioxin, producing manufacturing wastes containing most of the dioxin previously found in the final product.

Hercules sold its herbicide products, including 2,4-D and 2,4,5-T, to commercial customers during

the entire period that it operated the Jacksonville site. Pet. App. A6. Beginning in 1964, however, Hercules also submitted and won competitive bids for fourteen successive contracts to supply the United States with special mixtures, known as Agent Orange and Agent Purple, compounded from particular forms of 2,4-D and 2,4,5-T and used as defoliants by government forces operating in Vietnam. Pet. App. A3-A4; C.A. App. 2591-2593 (Hercules Fact ¶¶ 89, 95). The government contracts specified the proper form, packaging, labelling, and delivery of the desired product. Pet. App. A4.

Each of the government contracts, orders, and directives under which petitioner Hercules manufactured herbicides for the government included a "rating" allowing it to take priority over other contracts or orders. Each bidding package and contract set forth the applicable rating terms among many other standardized conditions, ranging from auditing and equal opportunity provisions to "buy American" certifications. Pet. App. A4; C.A. App. 2591 (Hercules Fact ¶ 90); C.A. Supp. App. 27-64 (bidding and contract forms); see *id.* at 29, 36. Each bidding package also contained provisions for withdrawing or altering bids. *Id.* at 30, 33. When Hercules returned bidding documents, they included the delivery schedule and defense order rating, price, and all other significant terms. The government then provided opportunities for negotiation of some of the contract terms. Pet. App. A4.[2]

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[2] Through its rated contracts with the United States, petitioner Hercules was able to obtain a priority from its suppliers for materials that would be used to fulfill the rated government contracts. Pet. App. A4. In March 1967, after

Becoming a government contractor also subjected Hercules to the terms of the Walsh-Healey Act. Pet. App. A4. That Act generally requires federal supply contracts involving more than $10,000 to stipulate, *inter alia*, that

> no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract.

41 U.S.C. 35(e). The Act also requires the contractor to pay minimum wages, to abide by forty-hour work week requirements, and not to hire minors or convicts. 41 U.S.C. 35.[3] Under its contracts, Hercules was required to comply with occupational health and safety standards promulgated by the Department of Labor. See 41 C.F.R. Pt. 50-204 (1963); 25 Fed. Reg. 13,809 (1960). Applicable regulations allowed the Department of Labor to conduct random inspections to monitor compliance with those standards. 41 C.F.R Pt. 50-205.9 (1963). Labor Department offi-

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petitioner had installed certain new equipment for which it had requested and obtained such priority delivery, the government issued a directive to Hercules to accelerate delivery of Agent Orange to a rate of 65,000 gallons per month. C.A. App. 2595 (Hercules Fact ¶ 102); Pet. App. A5.

[3] The Walsh-Healey Act is still in effect, but its worker safety provisions were incorporated into the more generally applicable Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

cials inspected the Jacksonville plant on two occasions during the four years that Hercules supplied defoliants to the government. Pet. App. A4-A5.

None of the supply contracts between the United States and Hercules addressed the disposal of hazardous substances. Pet. App. A5. Hercules buried wastes generated by its production processes before entering into its first government contract, and it continued to do so after filling its last government order. See Pet. App. A5-A6. Hercules personnel made decisions concerning waste disposal without direction of any kind from the United States. *Id.* at A6. Hercules never consulted government personnel involved in administering the supply contracts regarding burial or other waste disposal practices at the facility. C.A. App. 2612 (Hercules Fact ¶¶ 148-149).

The United States never participated in the management of petitioner Hercules' manufacturing facility. The government did not hire, train, manage, discipline, or fire petitioner's personnel. Pet. App. A5. It did not participate in accounting or bookkeeping activities, or share in profits or losses. It did not own any of the land, buildings, equipment, tools, or machinery used by petitioner. *Ibid.* The government did not design or implement petitioner's production process; it did not design, engineer or install production equipment; and it did not supply or own any of the raw materials that went into the product it purchased from petitioner. *Ibid.* Indeed, petitioner protected some aspects of its production process as proprietary information. *Ibid.*

Hercules made a profit for performing each rated contract for the supply of Agent Orange. Pet. App.

A6. After the government terminated its contracts for Agent Orange, Hercules continued producing similar commercial herbicides at the Jacksonville site. *Ibid.*

2. In 1980—before the enactment of CERCLA—the Environmental Protection Agency and the Arkansas Department of Pollution Control and Ecology entered into a consent order with petitioners Hercules and Vertac to address environmental contamination at the Jacksonville site. The district court approved that consent decree in January 1982. See *United States* v. *Vertac Chemical Corp.*, 588 F. Supp. 1294 (E.D. Ark. 1984). That decree did not succeed in resolving conditions at the site, however, and in 1992 the United States asserted CERCLA cost recovery claims against Hercules, Vertac, and others.

With one exception not relevant here, the district court has ruled on the liability aspect of all of the government's claims against private parties for CERCLA recovery costs. In particular, the court has granted summary judgment against petitioners Hercules and Vertac, among others, on the issue of liability (C.A. App. 6006-6010), leaving a variety of cost and allocation issues pending before the district court. Petitioners, however, also asked the district court to hold that CERCLA renders the United States liable for some share of the remedial costs, on the ground that, by means of its contracts for the supply of Agent Orange, the government either "operated" the Jacksonville facility or "arranged for disposal or treatment [there] * * * of hazardous substances owned or possessed by [the government]." 42 U.S.C. 9607(a)(2) and (3). Petitioner Hercules also claimed that Section 707 of the Defense Production Act (DPA), 50 U.S.C. App. 2157, either shielded it from,

or required the United States to indemnify it for, any CERCLA liability it might have incurred by using the Jacksonville site to manufacture Agent Orange.

The district court granted the government's cross-motion for summary judgment, holding that on the undisputed facts of this case the United States was neither an "operator" nor an "arranger" for purposes of CERCLA liability.[4] The court noted that the government never participated in actual management or daily operations of Hercules' manufacturing facility; never supplied, owned, or possessed the raw materials used to manufacture Agent Orange; and never dictated the manner in which Hercules was to dispose of manufacturing wastes. Pet. App. C9-C12. In sum, the court held that the government had no "authority over or involvement with Hercules' operations and decisions concerning the plant and the disposal of wastes." *Id.* at C12. The court rejected (*id.* at C11) petitioners' claim that any "compulsion" exerted by the United States under the Defense Production Act resulted in CERCLA liability on the part of the government: despite the government's power to require priority performance, the court held that for CERCLA purposes "the relationship between the United States and the contractor under the DPA

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[4] The court held that there were questions of fact concerning the government's potential liability as the "owner" of an ordnance manufacturing facility located at the Jacksonville site during World War II. Pet. App. C12 n.4. The government has since settled claims of liability arising from that period by agreeing to pay $1.9 million toward the cost of restoring the site. See 59 Fed. Reg. 13,749 (1994). No objection or public comment was received concerning that settlement, and the district court approved it on June 30, 1994.

is one of buyer and seller." *Id.* at C10. The district court also rejected, without discussion, the argument that Hercules should be immunized from or indemnified for CERCLA liability under Section 707 of the DPA. *Id.* at C12.

The court of appeals affirmed. Pet. App. A1-A18. Applying the standard adopted by the full Third Circuit in *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843-845 (1994), the court held that the government's purchase of Agent Orange through rated contracts did not make it an "operator" of the Jacksonville facility for purposes of CERCLA because the facts revealed no "actual" and "substantial" control of the facility by the government. Pet. App. A8. The court noted in particular the absence of several factors found relevant in *FMC*, including "considerable day-to-day control," management and supervision of workers, and compulsion to produce a completely new product using new manufacturing processes. *Id.* at A9-A10. In this case, by contrast, the court concluded that "it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility." *Id.* at A10. The court found the health and safety regulations imposed by the Walsh-Healey Act "insufficient bases for imposing CERCLA liability on the United States." *Ibid.*

The court of appeals similarly rejected petitioners' claim that the United States should be held liable as an "arranger" under CERCLA. Pet. App. A11-A15. After noting that "arranger" liability requires proof that the defendant "owned or possessed" hazardous substances, the court explained that "a governmental entity may not be found to have owned or possessed

hazardous substances under [42 U.S.C.] § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances." Pet. App. A12. The court rejected petitioners' argument that the terms of the Agent Orange supply contracts gave the government sufficient authority over petitioner Hercules to warrant holding that the government controlled the disposal of production wastes: Without ruling out the possibility that a government contract might involve "sufficient coercion or governmental regulation and intervention to justify the United States' liability as an arranger under CERCLA," the court held that "the undisputed facts of the present case do not support such a finding." *Id.* at A13. Similarly, without denying the ability to look beyond mere form in evaluating ownership or possession of hazardous materials, the court concluded that on the facts of this case the United States could not be held to have owned or possessed the raw materials obtained by Hercules or the work-in-process inventory that generated the wastes disposed of at the Jacksonville site. *Id.* at A14-A15.[5]

Finally, the court of appeals agreed with the reasoning of the Federal Circuit in *Hercules Inc.* v. *United States*, 24 F.3d 188, 203-204 (1994), cert. granted, 115 S. Ct. 1425 (1995) (No. 94-818), that Section 707 of the DPA "does not shield Hercules

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[5] The court of appeals declined to address the government's argument that the waiver of sovereign immunity in CERCLA did not permit the United States to be held liable on the basis of its regulatory activities under the Walsh-Healey Act. Pet. App. A15 n.10.

from liability it may have under CERCLA arising out of its performance of the Agent Orange contracts because such immunity would exceed the risk imposed by" the operative provisions of the DPA. Pet. App. A17. Moreover, having concluded that the DPA confers no immunity, the court also rejected the claim that the United States "implicitly promised to indemnify Hercules for the type of liability at issue in the present case." *Ibid.*

ARGUMENT

1. a. Petitioners contend (94-1557 Pet. 19-23; 94-1800 Pet. 19-21) that the courts of appeals have adopted different standards for determining "operator" liability under Section 107(a)(2) of CERCLA, 42 U.S.C. 9607(a)(2). As petitioners concede, most courts have imposed such liability only after finding that a party exercised substantial actual control over a particular facility. *E.g.*, *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).[6] That is the standard that the court of appeals applied in this case. Pet. App. A7-A11. Petitioners argue, however, that the Fourth Circuit's statement in *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842, cert. denied, 113 S. Ct. 377 (1992), that "authority to control—not actual control—[is] the appropriate standard"

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[6] See also *United States* v. *Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994); *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985).

for operator liability creates a conflict of authority that requires resolution by this Court.

Nurad rejected claims of operator liability against former corporate tenants that, the court concluded, neither had nor exercised any authority over underground storage tanks on the contaminated property. *Nurad*, 966 F.2d at 843-844. In *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 836-837 (4th Cir. 1992), the same court affirmed judgments against a sole shareholder who admitted that he was "in charge" of the facility and "responsible" for the property in question, and against a director who admitted that "he operated or otherwise controlled operations on the property in question." [7] Neither case turned on any practical difference between the "actual control" and "authority to control" standards; indeed, *Nurad* cited, with apparent approval, two cases from other circuits that focused on the defendants' "actual conduct." 966 F.2d at 842.

Moreover, the discussion in *Nurad* makes clear that the Fourth Circuit's verbal formulation was intended primarily to impose liability on parties who willfully failed to act to prevent or mitigate environmental damage. *Nurad*, 966 F.2d at 842 (standard "properly declines to absolve from CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous sub-

---

[7] *Carolina Transformer* also relied explicitly (978 F.2d at 837) on the district court's recitation of the evidence, which included findings that one of the individual defendants "personally directed" operations at the facility, while the other incorporated a new business and surreptitiously continued repair and rebuilding work that caused environmental contamination. *United States* v. *Carolina Transformer Co.*, 739 F. Supp. 1030, 1033-1034 (E.D.N.C. 1989).

stances but who declined to actually exercise that authority by undertaking efforts at a cleanup."). As petitioner Hercules points out (94-1557 Pet. 20), that intention is consistent with prior cases from the court below. See *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1382 (8th Cir. 1989). In the absence of more persuasive evidence that the courts are reaching (or even are likely to reach) inconsistent results on comparable facts, any difference in their expression of the applicable standard does not warrant intervention by this Court.

b. Petitioners also contend (94-1557 Pet. 25-28; 94-1800 Pet. 23-25) that the court of appeals' application of the "actual control" standard in this case conflicts with the Third Circuit's application of the same standard to different facts in *FMC Corp.* v. *United States Dep't of Commerce, supra.* As petitioners acknowledge (94-1557 Pet. 25; 94-1800 Pet. 23), the court below expressly adopted (Pet. App. A7) *FMC*'s articulation of the appropriate legal rule. Applying that rule, the court concluded that in this case, unlike in *FMC*, the United States did not "operate" the Jacksonville facility for purposes of CERCLA, because the government's contractual relationship with petitioner Hercules did not give it "actual or substantial control" (Pet. App. A11) of the facility and its waste disposal practices. The court's conclusion necessarily rests on "a fact-intensive inquiry and consideration of the totality of [the] circumstances." *Id.* at A8. In this Court, petitioners argue that the factual differences between this case and *FMC*, which the court of appeals found dispositive, were instead "immaterial" (94-1557 Pet. 25). That inherently fact-bound question does not merit further review.

In any event, whatever the merits of the *FMC* court's own conclusion on the facts of that case, the court of appeals properly distinguished this case from *FMC*. Pet. App. A8-A11; see generally C.A. App. 2848-2854 (comparison of factual findings). In this case, the United States was not "directly and entirely responsible for introducing a new manufacturing process" that generated hazardous wastes (Pet. App. A10); rather, the government contracted with petitioner Hercules to purchase a product compounded from "shelf-items," already produced by Hercules and commonly marketed in the private sector. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 817 (E.D.N.Y. 1984); see also *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 934, 950 (E.D.N.Y. 1992) ("The government sought only to buy ready-to-order herbicides."). The government did not ask or order Hercules to expand; it did not finance equipment purchases or own equipment outright; it did not supervise the construction of expanded facilities; and it did not help Hercules find or house its labor force. Compare Pet. App. A9 (quoting *FMC*, 29 F.3d at 843). Moreover, in this case the government did not "exert[] considerable day-to-day control over [the manufacturer] during the relevant time period" (Pet. App. A10, quoting *FMC*, 29 F.3d at 844); to the contrary, "it cannot genuinely be disputed that the United States was never actively involved on a regular basis in, and thus never exerted substantial control over, operations at the Jacksonville facility while Hercules was producing Agent Orange." Pet. App. A10.

The record therefore supports the court of appeals' conclusion that the government's contacts with Hercules—regulatory and contractual—were markedly fewer and less significant than those at issue in

FMC. There is no reason to speculate that the *FMC* court would have reached a different result on the facts of this case.

2. Petitioners argue (94-1557 Pet. 24-29; 94-1800 Pet. 25-28) that the court of appeals erred in holding that the government was not liable in this case as an "arranger" under Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3). Much of that argument centers on a claim that the decision below is inconsistent with prior decisions from the same court of appeals. See 94-1557 Pet. 19-20, 24-25 (citing *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (*NEPACCO*), cert. denied, 484 U.S. 848 (1987), and *United States* v. *Aceto Agric. Chem. Corp.*, *supra*). That is not an appropriate ground for review by this Court. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the decision below is both correct and consistent. The court of appeals held (Pet. App. A11-A15) that the United States could not be held liable for "arrang[ing]" disposal of Hercules' production wastes because neither the government's regulatory powers under the Walsh-Healey Act, 41 U.S.C. 35, nor its contractual relationship with Hercules gave it "owne[rship] or "possess[ion]," for CERCLA purposes, of the hazardous substances that Hercules produced. 42 U.S.C. 9607(a)(3). In reaching that conclusion, the court discussed and properly distinguished (Pet. App. A12-A15) its prior decisions in *NEPACCO*, which held that a corporate employee could constructively "possess" hazardous materials if he "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of" them

(810 F.2d at 743), and *Aceto*, which concluded on particular facts that the defendant had continued to own (and thus control) materials that it sent to another party for processing (872 F.2d at 1381-1382).

In this case, by contrast, the government "did not immediately supervise, or have direct responsibility for, the transportation or disposal of any hazardous substances generated" by Hercules in Jacksonville, either by law or by contract (Pet. App. A13); nor did it own, possess, or supply either the raw materials used by Hercules or the company's work-in-process inventory (*id.* at A14-A15). The court of appeals therefore correctly concluded (*id.* at A15) that the government's "sporadic and minimal" involvement in the operation of the Jacksonville facility could not support a finding that the government "owned or possessed" Hercules' wastes and "arranged for [their] disposal" within the meaning of Section 107(a)(3).[8]

3. Petitioners Vertac and Arkansas urge the Court to grant review in order to consider the argument made by the government below (see Gov't C.A. Br. 32-38) that CERCLA's waiver of sovereign immunity (42 U.S.C. 9620(a)(1)) does not extend to any claim based on the government's unique responsibilities or powers under the Walsh-Healey Act and the Defense Production Act. 94-1800 Pet. i, 8-10, 12-19. Petitioners do not identify any conflict among the courts of appeals on this issue, and we are aware

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[8] Petitioner Hercules suggests (94-1557 Pet. 23-24) that the decision below on "arranger" liability may conflict with decisions of the Ninth and Second Circuits. Petitioner does not explain in what respect the decisions are inconsistent, and in our view they are not.

of none. See *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d at 838-842 (rejecting sovereign immunity argument under CERCLA). In any event, we agree, in general, with petitioners' contention that a court should determine jurisdictional issues before proceeding to the merits. And we agree that if the Court were to grant review in this case, the sovereign immunity issue would present a necessary and preliminary inquiry, which might obviate the need to reach other issues raised by petitioners. Nonetheless, the court of appeals declined to address the government's sovereign immunity argument in this case. Pet. App. A15 n.10. Petitioners therefore effectively prevailed on that issue in the court below, and it is not an appropriate ground on which they may seek further review. See *California* v. *Rooney*, 483 U.S. 307, 311-314 (1987).

4. Petitioner Hercules contends (94-1557 Pet. 29-31) that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, provides it with "immunity for, and therefore an implied indemnity against, CERCLA liability" (94-1557 Pet. 29).

a. The court of appeals properly rejected petitioner's immunity claim. Pet. App. A15-A17. Whatever the merits of that claim, it is not properly presented here. Petitioner appears to have asserted a DPA immunity defense in its initial answer to the government's complaint against it. See Answer and Counterclaim of Hercules Incorporated 3 (E.D. Ark. No. LR-C-92-137). The issue of liability in that action has since been resolved by the district court's entry of summary judgment against petitioner (C.A. App. 6006-6010), but that judgment has not become final, both because of remaining liability issues involving

other parties, and because of cost determination and allocation issues that remain pending before the district court. This petition, by contrast, arises from a counterclaim brought by petitioner against the government. See Pet. App. C1, D1; C.A. App. 824, 838-839. Only a claim for indemnity by the United States—not a claim for immunity from petitioner's own liability under CERCLA—could constitute one of the "claims against the United States" on which the judgment at issue here was entered. Pet. App. D1.

b. The court of appeals also correctly rejected petitioner's claim of an "implied indemnity" under Section 707. Pet. App. A17. Moreover, petitioner has never made clear either the legal source of its claim, or the jurisdictional basis for consideration of that claim by the district court.

Petitioner has disclaimed the existence of any contractual right to indemnity. Hercules C.A. Br. 48 ("Here, there is no contract of indemnification."). In the court of appeals, petitioner argued instead that the "public polic[ies]" underlying CERCLA and the DPA "intersect to form an implied indemnity by the United States." *Id.* at 49. That novel theory depends on the resolution, in favor of petitioner, of the other questions on which petitioner seeks review here —the United States' liability under CERCLA, and petitioner's immunity under the DPA. Those questions do not, as we have explained, warrant further proceedings in this case; and petitioner's derivative indemnity claim provides no independent basis for review.

In any event, whatever the source of petitioner's claim, it seeks recovery of more than $10,000, and therefore falls within the exclusive jurisdiction of the United States Court of Federal Claims. See 28

U.S.C. 1491(a)(1); see also 28 U.S.C. 1346(a)(2). If petitioner believes that Section 707 entitles it to indemnity from the United States for any liability it has incurred under CERCLA by reason of its manufacture of Agent Orange, it must wait for that liability to be finally determined, and then bring a claim against the United States in the appropriate forum.

The point is illustrated by the history of litigation over tort liability for alleged defects in the Agent Orange manufactured by petitioners and others. Petitioner ultimately settled the tort claims against it —after having properly raised the DPA immunity issue as a defense to liability in those actions. See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 843-845 (E.D.N.Y. 1984) (discussion of DPA claim in opinion approving settlement), aff'd, 818 F.2d 145 (2d Cir.), cert. denied, 484 U.S. 1004 (1988). Petitioner then sought to recover its costs of litigation and settlement from the United States by filing a new action, based on a variety of contractual theories, in the Court of Federal Claims. Although petitioner raised no DPA indemnity claim in that litigation, another party did advance an indemnity argument based on Section 707. Both the Court of Federal Claims and the Court of Appeals for the Federal Circuit rejected that theory, but this Court has since granted review in the case, which is now awaiting briefing and argument. *Hercules, Inc.* v. *United States*, No. 94-818.

This Court's decision in No. 94-818 might well shed light on the legal merit of the DPA indemnity claim that petitioner seeks to raise here, in No. 94-1557. Nothing in the Court's decision, however, will remedy any jurisdictional defect in this case, or ren-

der appropriate for review in this case the CERCLA and DPA immunity issues on which the indemnity theory framed by petitioner depends. There is therefore no reason to hold the petition in No. 94-1557 pending argument and decision of No. 94-818.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1557

IN THE

Supreme Court Of The United States

October Term, 1994

HERCULES INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF HERCULES INCORPORATED TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were as follows:

(1) Appellant Hercules Incorporated has no parent company and has no subsidiaries or affiliates that are publicly traded;

(2) Appellee The United States of America;

(3) Appellant Arkansas Department of Pollution Control and Ecology;

(4) Appellant Vertac Chemical Corporation (no parent and no publicly traded subsidiaries or affiliates);

(5) Appellant Uniroyal Chemical Company, Ltd. (Parent Uniroyal Chemical Company, Inc.).

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CORRECTED STATEMENT OF FACTS

While irrelevant to the issues raised in Hercules' petition, there are factual errors in the United States' Brief in Opposition. These could lead to an erroneous impression of the relationship between the United States and Hercules in the production of Agent Orange. These errors need to be corrected.

The government incorrectly suggests (Op. 4) that Hercules competitively bid for all Agent Orange contracts. Nothing in the record supports that assertion. In fact, Hercules was forced to accept rated contracts, and its request for relief from the government's demands were rejected. (JA, Tab 19, ¶¶ 104, 105). *See also Hercules Incorporated v. United States*, 24 F.3d 188, 202 (Fed. Cir. 1994).

The government also incorrectly asserts that Hercules was able to produce herbicides for the commercial market during the entire course of its Agent Orange production. In fact, the government ordered that all of the commercial capacity for producing 2,4,5-T *in the country* be devoted to the production of Agent Orange. (JA, Tab 19, ¶¶ 80-81). After the government's 1967 directive Hercules was required to devote its entire production capacity (both 2, 4-D and 2, 4, 5-T) to Agent Orange production. (JA, Tab 19, ¶¶ 102-05). Indeed, also contrary to the government's assertion, Hercules was required to expand its production capacity to meet the government's requirements and to obtain additional equipment, through the use of rated orders, to enable it to do so. (FA, Tab 19, ¶¶ 100-01, 115.)

ARGUMENT

Earlier this term this Court decided to consider a case which places at issue the government's obligation to protect its contractors from products liability claims relating to strategically important products that the government compels manufacturers to produce. In that case, *Hercules Incorporated and Wm. T. Thompson Company v. United States of America*, Case No.

94-818, contractors which manufactured Agent Orange to the government's specifications during the Vietnam War in compliance with the government's mandatory orders issued under the authority of the Defense Production Act[1] incurred liability to servicemen who claimed to have been injured by exposure to Agent Orange. In this case, one of those Agent Orange contractors, Hercules Incorporated ("Hercules"), has incurred environmental liability as a result of complying with the same unrefusable orders.

This case complements case Number 94-818. Hercules competently and properly carried out the government's orders, but still incurred substantial liability by doing so. Public policy, clearly articulated by Congress in the Defense Production Act, demands that the government protect its contractors from these hidden penalties which may result from complying with the government's mandatory orders.

Amazingly, the government, after having sought a decision on the merits of Hercules' Defense Production Act claims and defenses in the district court, without objecting to the district court's jurisdiction; after having successfully sought to affirm the district court's decision on the merits in the court of appeals; and while now urging the Court to deny Hercules' petition (which would leave the court of appeals' decision on the merits in place) now, for the first time, argues that the district court never had jurisdiction in the first place. As shown below, the district court had jurisdiction to decide Hercules' counterclaim. If the government were correct that the district court did not have jurisdiction, however, that would require this Court to grant the petition, or, at least, to vacate and remand the court of appeals decision. A denial of the petition would leave in place decisions by the district court and court of appeals on the merits of Hercules' counterclaims that, according to the government, those courts had no jurisdiction to decide.

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[1] 50 U.S.C. app. §§ 2061, *et seq.*

Since, as the United States concedes, the Court's decision in Case Number 94-818 "might well shed light on the legal merit of the DPA indemnity claim," (Op. 19), this case at the least should be held for decision pending a resolution of that case. The courts below will need the Court's guidance on the Defense Production Act issues raised in that case.

If, however, the Court is inclined to give credence to the government's new suggestion that the district court and court of appeals did not have jurisdiction to decide the Defense Production Act claim, the decisions below should be vacated and the case remanded.

This case also presents important issues concerning liability for environmental clean-up costs under CERCLA[2] that merit this Court's review to resolve conflicts in the district courts and courts of appeals as to those issues.

Defense Production Act protection

When the government uses its power to require a contractor to manufacture a product for it for use in wartime, it has an obligation to hold that contractor harmless for the consequences of that production in compliance with the government's orders, whatever those consequences are.

That public policy is embodied in section 707 of the Defense Production Act.[3] As applied to this case, that public policy would require the United States to be held liable for all environmental response costs at the Vertac Site that are attributable to Agent Orange production that Hercules undertook pursuant to mandatory rated orders issued by the United States.

The ruling that Hercules seeks under the Defense Production Act in this case would affect relatively few contractors who share the unusual historical circumstances in which Hercules

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[2] CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

[3] 50 U.S.C. app. § 2157.

finds itself. Only contractors: (1) who were ordered to produce goods under rated orders or directives pursuant to the Defense Production Act; and (2) whose production of those goods inherently would lead to CERCLA liability and (3) whose facilities are no longer used for production for the government[4] would be affected.

As noted above, the government cites 28 U.S.C, §§ 1491 (a)(1) and 1346(a)(2) for the proposition that the United States Court of Federal Claims has exclusive jurisdiction over Hercules' counterclaim. Those sections only apply when a claimant seeks affirmative relief from the government, however. In this case Hercules seeks an apportionment of the responsibility for clean-up costs with the government. The relief Hercules seeks is therefore in the nature of a counterclaim for recoupment or set-off against the government, over which district courts have jurisdiction. *See U.S. v. Moore*, 703 F. Supp. 455 (E.D. Va. 1988); *FDIC v. Hulsey*, 22 F.3d 1472 (10th Cir. 1994); *U.S. v. Holder*, 292 F. Supp. 826 (S.D. Iowa 1968); *U.S. v. Summ*, 282 F. Supp. 628 (D. N.J. 1968). There is no jurisdictional bar to the Court's granting Hercules' petition and deciding this issue on the merits.

If the Court is inclined to disagree, however, the remedy is not, as the government asserts, a denial of Hercules' petition. That would leave in place district court and court of appeals decisions on the merits of Hercules' claim that those courts had no jurisdiction to render. Instead, the proper remedy would be for the Court to grant Hercules' petition, vacate the court of appeals and district court decisions as to Hercules' Defense Production Act claim, and remand the case to the court of appeals. There is no need for the Court to take such action now,

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[4] The Department of Defense routinely has allowed contractors to charge the costs of environmental cleanups -- even clean-ups for historical contamination -- as overhead in ongoing government contracts that are performed at such sites.

however, in light of the pendency of Case 94-818. This case can be held for decision pending the decision in Case Number 94-818.

CERCLA liability

Few areas of the law are as unsettled as the standards of liability for environmental response costs under CERCLA. The United States cannot reasonably deny that conflicts among courts attempting to construe the CERCLA provisions imposing "operator" and "arranger" liability abound. The Eighth Circuit in this case recognized the conflicts in decisions interpreting the standards for "operator" liability. The cases that Hercules cited in its petition reflect similar conflicts among courts which have attempted to interpret the standards for "arranger" liability.

The conflicts in court decisions on operator and arranger liability deprive parties who are accused of being liable parties under CERCLA the predictability of application of the law that they must have to guide their actions.

CONCLUSION

This Court has already decided to consider the United States' duty to protect those contractors from liability that they may incur by carrying out orders from the government that they cannot lawfully refuse. The Court's decision in Case Number 94-818 will influence the resolution of this case, as well. This case should be held pending a resolution of case Number 94-818. The other issues that merit this Court's attention, including a resolution of conflicting CERCLA liability decisions, can then be considered in light of the resolution of Case Number 94-818.

There is no jurisdictional impediment to the Court's deciding the merits of Hercules' Defense Production Act claim in the present posture of this case, but if there were, that impediment would require the decisions below to be vacated as having been rendered without jurisdiction.

Hercules respectfully urges the court to grant its petition for a writ of certiorari, or, alternatively, to hold this case for resolution of the Defense Production Act issues that have been raised in Case Number 94-818, or to vacate and remand for lack of subject matter jurisdiction in the courts below.

Respectfully submitted,
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